88-839

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANDREW L. ARRUZA, CAPTAIN,
CHAPLAIN'S CORPS, UNITED STATES ARMY,
056-32-5107,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. When the Supreme Court of the United States has been given statutory authority to review military court-martial cases in which the United States Court of Military Appeals, an Article I court, has exercised a discretionary power to grant a petition for review by the accused, on good cause shown, may the review by the Supreme Court, if granted, constitutionally be limited to those issues only as to which the Court of Military Appeals has granted the petition of the accused for review?

2. Does the Fifth Amendment guarantee of due process of law require establishment of probable cause by confidential two-sided investigation prior to the preferring of infamous charges against a commissioned officer?

3. Was it a denial of petitioner's constitutionally guaranteed right of confrontation for the Military Judge to exclude from the courtroom, with no opportunity for any questioning by the defense, the seven-year-old female child complainant, despite her having established her competency, been sworn, and testified substantively as to identity and place with respect to sexual offenses she had alleged previously, but refused to answer prosecution questions as to events thereafter, and to have read to the court members, in the absence of the witness, a newly prepared transcript of audiotapes of her statements during a pre-trial investigation over three months before?

4. Has the petitioner been denied due process of law through affirmance, by a majority of the Judges of the Court of Military Appeals, of a court-martial conviction after a trial during which a child psychiatrist, who had not seen an asserted child victim of rape and sodomy until after a statement had been taken from her by criminal investigators, more than a month after the events she had asserted could have taken place, was permitted to testify, over defense objection, (1) that the

child had a sexual encounter, one or more, with the petitioner, and (2) that the child believed she did have a sexual encounter with the petitioner?

5. May the Court of Military Appeals, if it grants a petition of an accused for review, validly refuse to review an asserted denial of due process of law in failure of subordinate military courts to comply with and enforce a statutory prohibition of imposition of a sentence extending to dismissal of an officer upon the basis of prior recorded testimony?

6. Was petitioner deprived of due process of law through failure of the Court of Military Appeals to review an assertion of error on the part of the Army Court of Military Review in dismissing as "nonmeritorious," without further discussion, asserted error of the Military Judge in admitting as expert testimony, over defense objection, the opinion of a Social Service worker as to "typical profiles" of child sexual abusers?

7. Was the Court of Military Appeals constitutionally required to review, as a matter of law, the issues of whether the conviction of the petitioner was, on the entire record, supported by substantial evidence and was not manifestly contrary to the weight of the evidence?

8. When, concurrent with limitation of any Executive review to matters of clemency, the Supreme Court has been given authority to review upon writ of certiorari certain court-martial cases, is it thereby implied that the Court of Military Appeals should be required to exercise a supervisory role over the military justice system to assure that persons accused will not be denied an opportunity for assertion and determination of errors which might in former years have been subject to correction by the Executive review provided as a substitute for plenary legislative review through the consideration of introduced private relief bills?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Andrew L. Arruza petitions for a writ of certiorari to review the decision of the United States Court of Military Appeals, entered in this case.

OPINIONS BELOW

On July 18, 1988, the United States Court of Military Appeals affirmed, 2-1[,] (26 M.J. 234), a decision of the United States Army Court of Military Review rendered November 27, 1985 (21 M.J. 621), which affirmed a conviction of the petitioner before an Army general court-martial convened at Mainz-Gonsenheim, Federal Republic of Germany, by the Commander of the Eighth Infantry Division (Mechanized), which, on November 2, 1983, found the petitioner guilty of taking indecent liberties with a female under the age of sixteen years, in viola-

tion of Article 134 of the Uniform Code of Military Justice (10 U.S.C. § 934). The sentence adjudged by the court-martial, which was approved without change upon review by the Convening Authority on February 9, 1984, was that the petitioner be dismissed from the service, confined at hard labor for five years, and to forfeit $2,000.00 per month for sixty months. The petitioner was confined in the United States Disciplinary Barracks at Fort Leavenworth, Kansas, until December 21, 1984, when he was released on parole pursuant to action of the Army Clemency Board.

On July 28, 1988, the petitioner here petitioned the United States Court of Military Appeals for reconsideration of its decision of July 18th, in light of the decision of this Court rendered June 29, 1988, in the case of *Coy* v. *Iowa*, —— U.S. ——, 56 U.S.L.W. 4931, and in light of petitioner's having been denied a fair trial in view of the testimony of an Army psychiatrist (recognized as impermissible by all three judges, but deemed harmless error or defense-induced by the majority), coupled with testimony by a civilian employee Social Service worker as to "typical profiles" of child sexual abusers. On September 22, 1988, the Court of Military Appeals entered an order denying the petition for reconsideration. The petitioner was given no opportunity to present further argument to the Court of Military Appeals, and the Order denying his petition for reconsideration presented no rationale.

JURISDICTION

The jurisdiction of this Court is invoked under Subsection 867(h) of Title 10, United States Code, and § 1259 of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth separately at the end of this volume.

STATEMENT OF THE CASE

Petitioner is now 48 years of age and married to a minister who is the sole pastor of a Protestant Christian church in the southern United States. He entered the ministry at the age of 40, having previously served for 13 years as an enlisted member of the U.S. Navy and for 9 years as a member of the U.S. Naval Reserve. He was first married in 1960, at age 20, during his first Navy enlistment, and had three children of that marriage, two daughters, whose present ages are 27 and 25, and a son, whose present age is 19. His first marriage was terminated by divorce in 1973, but he has remained on amicable terms with his former wife. After dissolution of the marriage, his daughters spent summers with him while they were of school age, and his son spent summers with him through 1982, when the son was 13 years of age. He completed seminary training and was ordained as a minister in the Lutheran Church of America, and was commissioned in the Chaplain's Corps of the United States Army in April, 1980.

Petitioner served for over two years as a battalion chaplain at Fort McClellan, Alabama. During that time, he underwent a marriage ceremony, but learned that the marriage was void by reason of a prior subsisting marriage of his intended bride. He was ordered to Mainz, Federal Republic of Germany, to a chaplain's post which contemplated a married incumbent, who, with his wife, would become a part of the officer social community. Central personnel administrators did not become aware that his marriage had fallen through until after he had arrived in Germany. He did not fit in to officer circles, junior or senior. Hence he had a strike against him from the outset.

His years of service as a Navy enlisted man tended to make him feel comfortable with troops, which was a mixed advantage so far as concerned one aspect of his chaplaincy. That background, however, made it easy for

him to form a friendship with a single woman Staff Sergeant who was also newly arrived in Germany. He took the woman out to dinner on one or two occasions and took her to his apartment where they engaged in sexual intercourse. While intolerance of officer-enlisted fraternization has lessened in recent years, it has not vanished. Rumors are rampant in military enclaves overseas, hence the association alone may have added a notch on his discreditation score.

He frequently entertained house guests in his apartment, at least one of them a woman friend from the United States. This probably provided grist for the rumor mill.

The woman Staff Sergeant, who is caucasian, called the petitioner around the first of January, 1983, saying that her six-year-old daughter, of whom she was a single parent, had arrived in Germany, and that she would like to have them meet. He had a guest in his apartment at the time, so he went to the hotel in which the Staff Sergeant was staying, and went for an afternoon walk in a nearby park with the daughter, Heidi, and her mother. He perceived that Heidi was biracial.

Details concerning Heidi and her social history are set forth in the detailed factual appendix in this volume. Unknown to the petitioner at the time, she was sexually knowledgeable to a high degree for a six-year-old. She had been rejected by her black biological father and petitioner seems to have been the first adult male who gave her any countenance. Heidi's mother had been a Mormon communicant; Heidi had been brought up in that faith; and her day care custodian in Germany was the wife in a Mormon family comprised of mother, father, and five children. All members of the household prayed several times daily, and Heidi's prayer was always that her mother might marry and get her a father and a baby brother. The mother had privately mentioned to Heidi on one or more occasions that petitioner would make a

good father for her, he being a religious man, fond of good music, gentle, and patient.

Surmisedly, petitioner felt that he was not being accepted by officer peers, and allied himself with a German Lutheran Church group which opposed introduction and maintenance of nuclear weapons in Germany by United States forces stationed there. He drove a rather distintive blue van, and had bumper stickers of the group, indicating their anti-nuclear sentiments, on the bumpers of that van. One of the members of the group was a single German woman who holds a doctorate in philosophy and speaks flawless English. She and petitioner established a liaison. At some point, probably in March, 1983, petitioner told the Staff Sergeant that he had an ongoing relationship with another woman, with the implication that there would be no further romantic relations between them. They had engaged in a second act of sexual intercourse in February, after she and Heidi had moved into an apartment which became available.

In early April, 1983, petitioner was assigned detached duty with troops in Todendorf in North Germany, approximately seven hours driving time from Mainz. His performance as a chaplain with troops seems to have been satisfactory, and he might well have completed his overseas tour on detached assignments but for one risen ghost.

Heidi had formed a strong affection for petitioner which he accepted with tolerance but without reciprocation. When petitioner left Mainz there was no longer any watching for the blue van in the parking lot as she and her mother drove by petitioner's apartment house on their way home at days ends; no going up to petitioner's seventh floor apartment to see him at the door, and occasionally to be invited in for a short or long visit; no occasional shared meals in his apartment; and no television viewing by the three, during which Heidi would sit on petitioner's lap and comb his hair. Petitioner's

absence from Mainz, with the indicated deprivations to Heidi, had continued for six weeks. On Wednesday, May 18th, 1983, Heidi had a difficult day. Her mother was told by neighborhood children, when she came to the custodian's home to pick up Heidi, that Heidi had been "humping," [engaging in sexual intercourse] with a young boy called "Spooker." When Heidi got back to their apartment with her mother, she complained of extreme pain while urinating, and told her mother that she had inserted a pencil into her vagina while ostensibly taking an afternoon nap at the home of the custodian. Heidi's mother called the custodian, and the two agreed that they should take Heidi to a medical facility. The mother elected to take Heidi to an Air Force hospital in Wiesbaden, some fifteen minutes driving time from Mainz, rather than to take her to the Station Hospital where Heidi's mother worked.

En route to Weisbaden, Heidi's mother and her day custodian subjected her to a severe grilling as to her conduct during the day. Heidi sullenly refused to answer their questions, and broke down and cried. After more questioning, Heidi exclaimed, "The real truth is, momma, that Andy was humping me." "Andy" was the name by which Heidi called the petitioner, and she knew no other person who had that name. The mother and custodian asked Heidi what "humping" meant, and she answered in graphic anatomical detail. Heidi's mother asked Heidi if she had ever seen petitioner's penis, and Heidi responded affirmatively.

At the Hospital in Weisbaden, Heidi was seen in the Emergency Room. The examining physician noted erythema (redness) and noted that Heidi had an intact hymen, but found no indication of a pencil in the vagina. He referred her to the Pediatric Clinic, where Heidi was taken on the following day. A pediatrician was mindful of the possibility of sexual abuse, and asked Heidi a question to the effect of, "Has anyone done anything to

you there?" indicating her genital area. Heidi responded negatively. Heidi's mother, who was in the room at the time, did not comment.

On returning to her duty post at the Station Hospital, Heidi's mother mentioned the incident to her immediate supervisor, a woman First Sergeant who was noncommissioned officer in charge at the Station Hospital. The First Sergeant told the Lieutenant Colonel who commanded the Station Hospital. He had a position in the Commuity Organization, under a separate chain of command, as Chairman of the Child Protection Team. He immediately sought the aid of the Combat Intelligence Division (CID), reported the incident to the Child Protection Team, and, in his capacity as Hospital Commander, ordered Heidi's mother to cooperate fully in the investigation, and to do all she could to insure Heidi's cooperation.

Heidi was immediately brought in to be interviewed by a civilian investigator and social service workers. She refused to talk in the presence of a social service worker, who was an older woman, but after that woman and her mother had left the room, she talked at length to a young woman special agent, detailing luridly acts of rape and sodomy performed upon her by the petitioner.

A report of investigation, setting forth Heidi's allegations to the Special Agent, was delivered to the Commander of the First Batallion, petitioner's superior, on Friday. The Battalion Commander had petitioner ordered to come from Todendorf to Mainz, and to be in the Battalion Office early Monday morning, May 23rd.

When petitioner came to the Battalion Office on Monday, the Commander read him a Miranda type warning, but without indicating the nature of any offense suspected. Petitioner's appearance and demeanor were normal to that point. The Commander then read to petitioner the allegations of Heidi as set forth in the investi-

gative report. Petitioner's countenance dropped, his mouth fell open, and he exclaimed, "No, No, I never touched that child!"

Petitioner went to see Heidi's mother in the office of the Commander of the Station Hospital. She kissed petitioner lightly on the check, and made some remark to the effect that she had hoped that some day they might marry. Petitioner then went back to the Battalion Office, and was told that he should obtain counsel. Petitioner consulted a Captain, Judge Advocate General's Corps, who suggested that he might arrange for a polygraphic examination of petitioner, which, if petitioner passed, would probably terminate the matter. Petitioner underwent the polygraphic examination, but the examiner had a hostile manner and phrased his questions with reference to sexual acts with the use of the term, "this girl." To petitioner "this girl" referred to the German woman with whom he was clandestinely living, and denials produced physiological reactions. When the examiner pointed these out, his hostile manner indicated to petitioner that he was not to be taken into petitioner's confidence regarding petitioner's relations with the German woman, which petitioner did not believe at the time to be suspected in command circles. Petitioner therefore terminated the interview.

The polygraph examiner made up an investigative report, indicating his opinion that petitioner had shown reactions consistent with deception or suppression when denying sexual activity with Heidi. The report was submitted to the Battalion Commander, who thereupon preferred charges of rape and sodomy upon the body of Heidi against the petitioner, executing an oath that the Battalion Commander had personal knowledge of or had investigated the charges and that they were true to the best of his knowledge and belief.

The Battalion Commander recommended that petitioner be brought to trial before a general court-martial upon

the charges preferred. A pre-trial investigation was ordered, before which Heidi appeared on June 27th. This was the first time Heidi had seen petitioner since early April, and upon entering the room, she ran over and sat down at the table beside him, greeting him affectionately. Nonetheless, at the pre-trial she repeated the accounts of sexual acts by the petitioner substantially as she had related them to the special agent the month before. Heidi had been seen by a child psychiatrist during the interim, and while she had not orally communicated with him, she had drawn stick pictures indicating a figure on a bed with a man standing beside it.

Counsel for petitioner stated that he would examine Heidi at the pre-trial for discovery only. He did talk to her at some length, but in a friendly conversational manner, without challenging any assertion or trying to induce contradictions or to have her admit impossibilities and absurdities in her statements.

A general court-martial trial for petitioner upon rape and sodomy charges was ordered, and open court proceedings began on Thursday, October 27th, 1983. Petitioner was represented in the trial proceedings by civilian counsel, assisted by the military counsel who had previously acted. None of the trial defense counsel has participated in the representation of petitioner at the review and appellate phases, and none of appellate counsel was in any way involved at the trial phase.

Essential facts pertaining to the general court-martial trial are set forth below under pertinent "Reasons for Granting the Writ," and in the detailed factual appendix in this volume.

REASONS FOR GRANTING THE WRIT

I. FOR SERVICE GUIDANCE, CLEAR DEFINITION IS REQUIRED OF THE PROPOSITION THAT WHILE THE CONGRESS MAY BY STATUTE PRECLUDE ALTOGETHER REVIEW BY THE SUPREME COURT UPON WRIT OF CERTIORARI OF COURT OF MILITARY APPEALS DECISIONS, TO ANY EXTENT THAT SUCH REVIEW AUTHORITY IS IN FACT GRANTED THEN IN ANY INDIVIDUAL CASE IN WHICH THE CRITERIA FOR REVIEW ARE MET AND CERTIORARI IS GRANTED, NO LIMITATION MAY BE CONSTITUTIONALLY IMPOSED UPON THE SCOPE OF SUCH REVIEW.

All courts-martial and review and appellate courts for courts-martial are currently established under Article I of the Constitution, pertaining to the Legislative Branch of the Federal Government. The Supreme Court is directly provided by Article III as an equal branch of the Government. The Congress may by statute control access to the judicial power of the United States, but may not direct the manner of exercise of that power in cases in which access has been granted.

Subarticle 67(h) of the Uniform Code of Military Justice (10 U.S.C. § 867(h)) prohibits the Supreme Court from reviewing by writ of certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The purpose of the Congress in enacting that prohibition was to preclude swamping the Supreme Court with petitions for certiorari in military cases. Appellate defense counsel are provided to military members convicted of major offenses and sentenced to substantial punishment. Since applications for certiorari in military cases may be made without payment of filing fees, were there no limitation upon cases in which certiorari may be sought, military appellate counsel would be virtually constrained to petition for that writ in any situation in which there might be any sem-

blance, however slight, of an arguable deprivation of a constitutionally guaranteed right. The Court of Military Appeals therefore is made a screening body by virtue of its discretionary authority to grant or not to grant petitions for review. Where, however, the screen has been passed, and a petition for review granted on any ground whatsover, then a petition for certiorari may be made and review by the Supreme Court sought as to any issue of law deemed presented in the specific case, whether or not the Court of Military Appeals considered that issue in any way. Otherwise, the Court of Military Appeals could in effect dictate to the Supreme Court the *issues* it would be empowered to review in a specific case. That the Congress may not constitutionally do, and *a fortiori* a legislative court established by the Congress may not do.

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES ESTABLISHMENT OF PROBABLE CAUSE BY CONFIDENTIAL TWO-SIDED INVESTIGATION PRIOR TO THE PREFERRING OF INFAMOUS CHARGES AGAINST A COMMISSIONED OFFICER.

The exception of cases arising in the land or naval forces from the Fifth Amendment requirement of grand jury presentment or indictment as a condition precedent to holding any person to answer capital or otherwise infamous charges, imposes upon the Armed Forces, under the due process clause of that amendment, an obligation to follow substantially equivalent procedures to the same ends. Cases of alleged sexual abuse of children, particularly where the nature of the alleged abuse is such as to produce no visible evidence of its occurrence, are pre-eminent examples of the need for magistrates' probable cause and grand jury indictment procedures in civil life. Such allegations are ruinous to an adult against whom made, and there is no practical sanction which can be imposed upon a young child who has made such an allegation falsely. There is further no practical sanc-

tion available against an adult who, with whatever motive and for whatever end, has manipulated a child into making or maintaining a baseless charge of sexual abuse. A magistrate's hearing provides a summary device for disposing of allegations which are specious on their face, and the grand jury brings the common sense of the community to bear after responsible citizens have assessed the respective probabilities.

Had the instant case arisen in civil life, a magistrate would have confidentially examined Heidi and her mother concerning the nature and extent of association between petitioner and Heidi and physical circumstances and opportunities for petitioner to have performed the acts claimed. Petitioner's commander, Lieutenant Colonel Murray, should have done no less, and the statutory requirement that he swear to his belief in the truth of the charges preferred clearly implied that he do no less.

The only practically effective means of requiring military authorities to follow sound preliminary procedures in advance of preferring disgraceful charges against officers who may be in command disfavor for reasons unrelated to those charges, is that of reversing on constitutional grounds cases in which suitable caution has not been exercised before placing an officer in the pillory.

Certiorari is sought to the end that the Supreme Court may examine this issue and provide sound guidance to Armed Forces administration.

III. THE COURT OF MILITARY APPEALS WRONGLY DECIDED THE ISSUE OF DENIAL TO PETITIONER OF THE CONFRONTATION WITH THE WITNESS AGAINST HIM GUARANTEED HIM BY THE SIXTH AMENDMENT.

The six-year-old child (seven at the time of the trial), whose impulsive statements under pressure of badgering by her mother and baby sitter provided the sole basis for the court-martial trial of petitioner, was an indispensable

witness who the defense had to be given an opportunity to cross-examine if the Confrontation clause has any meaning whatsoever. Her refusal, for whatever reason, to repeat at the trial any allegation she had previously made as to sexual abuse of her by the petitioner, had to be accepted as a failure of the prosecution to make its case.

There was no occasion for introduction of the record of statements by Heidi at the pre-trial investigation. She was present, had fully established her competency as a witness, and had testified substantially and accurately as to the scene of the events she had related. She was simply not "unavailable" under any rational definition of that term. Had it been proper to introduce the transcript of her pre-trial statements, she should have been required to remain in the courtroom on the witness stand during their reading, and should have been subject to examination by the defense thereafter. Her silence and her indication of emotional distress, if such actually ensued, would be part of her demeanor as a witness for the court members to observe and assess as to the probable prompting motive. She as good as stated that her refusal to testify was prompted by fear that she would be exposed as a liar.

Refusal of the Court of Military Appeals to recognize a right of an accused to examine a witness for discovery only during a preliminary proceeding runs counter to the basic principles of the criminal justice system, particularly the presumption of innocence. If a child witness breaks down and recants during a pre-trial, then the prosecution charges badgering by defense counsel and brings in psychological and social service evidence that no recantation of allegations of child abuse is ever credible. If the defense sits mute, then the pre-trial statement becomes admissible on the theory that there was an *opportunity* for cross-examination which was not exercised. Cross-examination at a preliminary proceeding is simply not as valuable as in open court at a determinative trial.

The element of potential surprise is lacking, as well as confrontation with inconsistencies which the witness does not have sufficient time to explain away upon reflection and consultation.

This case presents an *a fortiori* situation with respect to *Coy* v. *Iowa*, in which this Court held that confrontation had been denied. Certiorari is requested to permit the declaration of sound basic constitutional principles governing military courts-martial.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW IN PERMITTING, IN PRACTICAL EFFECT, HIS CONVICTION TO BE BASED UPON THE VERDICT OF A PSYCHIATRIST WHO HAD NEVER SEEN HIM.

The dissenting Chief Judge of the Court of Military Appeals correctly stated that it was incurable error to permit Dr. Vandewalle to state that in his expert opinion Heidi had a sexual encounter *with the petitioner*, and that she believed she did have such an encounter. This was effectively taking the members of the court-martial off the bench, and putting the 35-year-old physician in their place.

There is basically no place for psychiatric testimony in a child abuse case unless it be directed to establishment or refutation of a claim that the child is afflicted with a mental illness which affects its credibility. A physician in a clinical setting is in an inferior position to that of the lay juror so far as concerns determining whether one talking to him as a patient is telling him the whole truth. Such a physician has an unavoidable bias for the patient whom he has seen and against any third person who the patient claims has wronged him or her, and who the physician, more often than not, will not have seen. Such is human lie detector evidence without the aid of physiological reaction indicators.

In a military setting there is the additional factor militating against the introduction of such evidence that a psychiatrist who is a member of or employed by the armed forces can only gain by supporting a desired command outcome, but has much to lose by supporting the position of an individual accused, who is unlikely ever to be in a position to make out fitness or efficiency reports on the doctor.

To say that the error in admitting the testimony was harmless is simply unrealistic. Far from being a case in which evidence of guilt was overwhelming, here the totality of the circumstances indicated innocence. The fact that members of the court-martial asked the questions of Doctor Vandewalle implied a feeling that they would be unable to make a sustainable conviction without them. As to the error being defense induced, had the doctor not been brought to the stand, there would have been no occasion for the defense to question him. Since he was brought to the stand and testified as to having seen the pre-trial statement of the child, what cross-examination technique was available other than to point out demonstrably false claims made in that statement, and ask if he believed them?

Certiorari is requested for clarification of the law on this aspect of expert medical testimony.

V. THE COURT OF MILITARY APPEALS ERRED IN FAILING TO GRANT REVIEW OF AN ISSUE OF DUE PROCESS OF LAW IN FAILING TO COMPLY WITH AND ENFORCE A STATUTORY PROHIBITION OF A SENTENCE TO DISMISSAL ON THE BASIS OF RECORDED PRIOR STATEMENTS.

In 1748, prompted by the 1741 loss of HMS WAGER during an early phase of a circumnavigation of the globe by a squadron of eight vessels under the leadership of the then Captain George Anson, RN, the British Parliament enacted two statutes relating to obligations of survivors

of shipwrecked or enemy-captured vessels. The WAGER was lost in a storm off the West Coast of Chile after the ships of the squadron had been separated during the rounding of Cape Horn, and survivors were cast ashore on a small island, later named Wager Island. Survivors divided into two factions; a midshipman was shot by the commanding officer, dying a few days later as a result of the gunshot wound, the commanding officer mistakenly believing that the midshipman was part of a mutinous conspiracy. Some members of each faction of survivors later made their way back to England by different routes and arriving at different times. In the interim, Anson had completed the circumnavigation with only one ship of the squadron remaining, but fortunately had in that ship a vast amount of Spanish booty, hence was made First Lord of the Admiralty rather than being cashiered for having conducted a disastrous enterprise. The two statutes were incorporated in the British Naval Discipline Act of 1749, enacted under the aegis of Admiral the Lord Anson, which code remained in effect at the time of the American Revolution and at the time of the formation of the present government of the United States.

The two statutes attacked the problems presented by repatriation of survivors of naval disasters. Those who had survived bureaucratic contests and achieved positions of leadership sometimes would not be the ones who would prove best able in a continuing crisis situation, during the absence of parent government support and control, to effect the greatest good for the greatest number of his or her fellows. But, like the Admirable Crichton, the transient dominant must preserve some semblance of subordination during the crisis and be made to resume his (or her) former station when it is past.

A basic tenet of admiralty law is that rights of persons aboard are dependent upon the vessel itself, and when the vessel is no more rights may become matters of grace of the vessel owners. The Anson statutes pro-

vided that compensation of those who served aboard lost or captured naval vessels should continue after the casualty, but only as to those who acted in a proper disciplined manner according to the law. Proof of their so acting had to be established before a court-martial. That court-martial was not one in the present concept of a tribunal for the resolution of alleged offenses, but an investigating body to obtain and record all evidence pertaining to the disaster. Each survivor had to be accorded great leeway in recounting recollections, but persons who held or assumed positions of dominance during the crisis had to be protected against others, possibly a majority, who were resentful of domination. Protection of the crisis leaders would be effected by providing that testimony taken during the investigative court-martial could not be used in a subsequent offense-adjudicating court-martial in a capital case or one extending to dismissal of a commissioned officer. In other words, if a life or the continuation in service of a commissioned officer was at stake, then the accused person had to be confronted with live witnesses and given the opportunity to cross-examine them. In the cases of the WAGER survivors, no second court-martial was ever convened, public interest having abated after the investigative proceeding.

In the United States, the investigative court-martial became known as a court of inquiry. The Articles of War of 1786 and Articles for the Government of the Navy of 1799 and 1800 provided for courts of inquiry and prohibited recorded testimony before such courts from being used in capital cases and those extending to dismissal of officers. It has always been clear that such prohibition of use is not a rule of evidence prohibiting introduction of such testimony, but instead a limitation upon the punishment that may be imposed if such evidence would be a necessary basis for a sentence of death or dismissal.

The prohibition of use of recorded court of inquiry testimony in capital and dismissal cases is continued in

Article 50, Uniform Code of Military Justice (10 U.S.C. § 850). Regulations implementing that Article establish the obvious proposition that the limitation applies to any form of previous recorded testimony, without regard to the style of the proceeding during which it was recorded. A court of inquiry being the most solemn investigative proceeding, highly protective of individuals whose conduct and performance may be brought into question, then if its proceedings cannot be made the basis of death or dismissal sentences, *a fortiori* may not the records of less formally conducted proceedings.

In the case of petitioner, the testimony of Heidi provided the sole basis upon which he could be sentenced to dismissal upon the charges, there being no other evidence of the commission of those offenses. If exclusion of Heidi from the courtroom and reading her prior recorded statements into the record be held proper, then such had to be done at the cost of instructing the court-martial that it could not impose a sentence of dismissal.

VI. PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW THROUGH FAILURE OF THE COURT OF MILITARY APPEALS TO REVIEW AN ASSERTION OF ERROR ON THE PART OF THE COURT OF MILITARY REVIEW IN DISMISSING AS "NONMERITORIOUS" WITHOUT FURTHER DISCUSSION, ASSERTED ERROR OF THE MILITARY JUDGE IN ADMITTING AS EXPERT TESTIMONY, OVER DEFENSE OBJECTION, THE OPINION OF A SOCIAL SERVICE WORKER AS TO "TYPICAL PROFILES" OF CHILD SEXUAL ABUSERS.

A Mrs. Ogilvy-Lee testified as a witness in rebuttal to the inference of good character arising from the petitioner's status as a chaplain and the credible showing made by the defense as to the improbability of his having committed the molestation as charged. She asserted the prototype of a sexual abuser as being a heterosexual male with a pregnant wife, lonely, and seeking affection, who

has difficulty in his relationships with women, is non-violent, well known to the child he is suspected of having abused, may also have normal sexual relations with adult women, tends to have no self-respect, has no respect for women in general, and disrespects the child's mother because she is so weak. Her prospective testimony had been explored in a session out of the hearing of court members, and the Military Judge had ruled it admissible over the strongest defense objections, with citations of authority. The Military Judge specifically ruled, *inter alia*, that the probative value of such evidence outweighed any prejudical effect it might have.

Superficially, such testimony appears innocuous, the "profiles" being ones into which vast numbers of persons could fit, often even one or more of the triers of fact who might well be antagonized by such testimony. That argument, however, overlooks the reaction of a juror in reasoning that a respected trial judge who has permitted such apparent claptrap to be introduced must feel that there is some concealed deeper significance which the judge feels he will be sufficiently intelligent to perceive.

Obviously, there is no probative value, in a trial for automobile theft of one who happens to be left-handed, in evidence of statistical data that 90% of persons previously convicted of automobile theft have been left-handed, nor in psychological testimony that many left-handed persons feel rejected and have low self-esteem which may be temporarily alleviated by stealing an automobile.

In a military setting there is the positive vice that such testimony is being given by a responsible member or employee of the Armed Forces, often one attached to the same command as the court members, with whom the court members may variously have dealt or may expect to deal in their official military capacities. The witness is a person with whom one may someday have to "go along to get along," and the command which has ordered

the trial may be expected to feel displeasure over any rejection of the efforts of a valued member of the command organization who has devoted time and effort to the furtherance of his or her part in the overall command mission.

The only shield of one in the military justice system against entreaties to utilize the expertise of command personnel involved in social disciplines which bear upon a prosecution, is that of having a Supreme Court decision squarely stating that the admission of such evidence constitutes reversible error. Certiorari is requested in this case to permit such a declaration.

VII. THE COURT OF MILITARY APPEALS WAS CONSTITUTIONALLY REQUIRED TO REVIEW, AS A MATTER OF LAW, THE ISSUES OF WHETHER THE CONVICTION OF THE PETITIONER WAS, ON THE ENTIRE RECORD, SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS NOT MANIFESTLY CONTRARY TO THE WEIGHT OF THE EVIDENCE.

Subarticle 67(d) of the Uniform Code of Military Justice (10 U.S.C. § 867(d)) includes the provision, "The Court of Military Appeals shall take action only with respect to matters of law." That provision must be read in conjunction with Subarticle 66(c) (10 U.S.C. § 866 (c)), which mandates that a Court of Military Review "may affirm only such findings of guilty and the sentence or such part of amount of the sentence, as it finds correct in law and fact and determines on the basis of the entire record, should be approved." The Court of Military Review is authorized to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact, subject to the admonition that the Court must recognize that the trial court saw and heard the witnesses.

The legislative intent is unmistakable, i.e., that the Court of Miliary Review is the principal adjudicator of

factual issues. This is sound, in that the members of those Courts are more likely to have military expertise than are the civilian judges of the Court of Military Appeals.

However, findings of expert bodies which are either unsupported by substantial evidence or manifestly contrary to the weight of the evidence which was presented for their consideration are universally held to be reviewable as matters of law. This is true regardless of how abstruse may be the subject matter, there simply being a greater burden upon an opponent to demonstrate lack of support in the record when the subject is highly technical.

There is nothing abstruse or peculiarly military about a child's allegations of having been sexually molested by an adult, nor is there anything unusual about a child's later refusing to support such allegations in open court. A strong case can be made for limiting consideration of such matters to civil courts and administrative agencies, which are far better facilitated to deal bindingly with all aspects presented, e.g., marriage dissolution, deprivation of parental rights, adoption, provision of supervised foster care. A court-martial is limited to the punishment of offenders, which may often punish victims to as great or greater an extent.

Military commands must learn what civil jurisdictions have known for ages, i.e., that young children are often undependable witnesses, and there is no legerdemain whereby lawyers can make a sustainable case without evidence. The reversal of convictions not based upon valid evidence provides the one means of getting this lesson across, and the Court of Military Appeals should be instructed that it has not only the right but the duty to review and reverse any affirmance of a conviction which has not a shred of legal evidence to support it. The only protection which lawyers in the Armed Forces have

against being forced by command pressure to undertake action contrary to their professional judgment and the experience of the profession as a whole, is that of being able to cite a Supreme Court decision holding that the action they are being urged to take will not be sustained. Certiorari is requested in this case to the end of obtaining such a decision.

VIII. REMOVAL OF THE EXECUTIVE AUTHORITY FROM ANY REVIEW OF LEGALITY OF COURTS MARTIAL, CONCURRENT WITH AUTHORIZATION OF REVIEW OF CERTAIN SUCH CASES BY THE SUPREME COURT ON WRIT OF CERTIORARI, IMPLIEDLY IMPOSES UPON THE COURT OF MILITARY APPEALS AN OBLIGATION TO PERFORM A BROADER SUPERVISORY ROLE OVER THE MILITARY JUSTICE SYSTEM.

The petitioner is a commissioned officer of the Regular Army, appointed by the President of the United States, by and with the advice and consent of the Senate. From the formation of the present government until the Uniform Code of Military Justice became effective in 1951, a court-martial sentence extending to dismissal of such an officer required confirmation by the President of the United States, prior to being carried into execution. Legislative review and correction of court-martial records could, until 1946, be effected through the medium of introduction and enactment of private relief bills. The Legislative Reorganization Act of 1946 prohibited introduction in the future of private relief bills to correct military or naval records, and empowered military department Secretaries to make such corrections. The Military Justice Act of 1983, concurrently with authorizing review upon writ of certiorari of court-martial cases as to which the Court of Military Appeals had granted petitions for review, prohibited review of courts-martial by military department secretaries under the 1946 legislation, except as to matters of clemency.

The effect of requiring Presidential confirmation of officer dismissal cases, and of making Secretarial review available under the 1946 legislation, was to pose a deterrent to command attempts to rid themselves of unpopular officers through spurious court-martial proceedings. The potential for review of any such case by a responsible officer of the Executive Branch subject to political persuasion was something that could be pointed out by any lawyer who was asked by a command to initiate an indefensible court-martial proceeding with a view to dismissing an officer.

The possibility of obtaining review upon writ of certiorari and a reversal of a conviction by the Supreme Court is now the only shield a military lawyer has against being compelled by command pressure to initiate a meritless case. The case of petitioner is such, and it is urged that certiorari be granted to demonstrate to military authorities that the Constitution of the United States precludes making court-martial proceedings instruments of oppression to rid their commands of officers who have incurred displeasure for reasons unrelated to, apart from, and more equivocal than, the conduct charged in the court-martial proceedings. To carry out the legislative intent underlying the 1983 legislation, the Court of Military Appeals should expand its grants of review of petitions asserting deprivation of constitutionally guaranteed rights.

CONCLUSION

The case of petitioner is one in which command control has been exercised to an extreme extent to obtain conviction, a sentence to dismissal, and affirmation of such conviction and sentence upon disgraceful charges for which there is no support in the record or basis in fact. The effect of the dismissal, if executed, will be permanently to drive the petitioner from the ministry and to deprive him of benefits earned through over 25 years of previous service in the Armed Forces of the United States

which is unblemished, and to impose upon him for the balance of his life, and upon members of his family bearing the surname a wholly unwarranted stigma.

For the reasons set forth above, petitioner prays that a writ of certiorari issue to the Court of Military Appeals to permi' a review by the Supreme Court in the interests of justice to the petitioner individually and of furtherance of sound exercise of court-martial authority in the Armed Forces generally.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX

U.S. ARMY COURT OF MILITARY REVIEW

CM 445358

UNITED STATES,
Appellee,
v.
CAPTAIN ANDREW L. ARRUZA,
056-32-5107, UNITED STATES ARMY,
Appellant.

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27 Nov. 1985

For Appellant: Homer A. Walkup, Esquire (argued); Colonel William G. Eckhardt, JAGC, Lieutenant Colonel Arthur L. Hunt, JAGC, Captain Thomas J. Feeney, JAGC, Captain Carolyn F. Washington, JAGC (on brief).

For Appellee: Captain Robert L. Swann, JAGC (argued); Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Major Patrick M. Flachs, JAGC (on brief).

Before MARDEN, WATKINS, and LYMBURNER, Appellate Military Judges.

OPINION OF THE COURT

WATKINS, Judge:

Appellant, a divorced officer with approximately fourteen years of active-duty service and assigned as a military chaplain in Europe, contrary to his pleas, was

convicted by a general court-martial with members of taking indecent liberties with the body of a female under the age of sixteen years (two specifications) in violation of Article 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 934 (1982).[1] The sentence, to dismissal from the service, confinement at hard labor for five years, and forfeiture of $2000.00 per month for sixty months, was adjudged on 2 November 1983. In conjunction with initial review of this case, the convening authority approved the findings of guilty and the sentence on 9 February 1984. Allied papers associated with the record of trial indicate that the appellant was released on parole on or about 21 December 1984 pursuant to action by the Army Clemency Board.

Before this Court, the appellant alleges (1) a denial of due process resulting from the failure of his battalion commander and accuser to properly investigate the allegations; (2) a confrontational violation resulting from the admission into evidence at trial of the substitute (Article 32, UCMJ, 10 U.S.C.A. § 832) testimony of the six-year-old alleged victim,[2] (3) an abridgement of Article 50, UCMJ[3] mandating sentence relief; (4) prejudice resulting from the expert testimony of Dr. Vanderwalle, a child psychiatrist who treated the alleged victim; (5) prejudice stemming from the rebuttal testimony of Mrs. Ogilvy-Lee, Army Community Services Director of

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[1] The appellant was arraigned and tried on charges of rape and sodomy, both of a female under the age of sixteen years, in violation of Article 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925 (1982), respectively.

[2] Unlike some of the cases cited in this opinion, this case involves an alleged victim who was not an adult but rather a child of tender years whose knowledge, understanding, and perceptiveness of sexual matters and ability to recall and testify with respect thereto were only partially developed.

[3] Article 50, UCMJ, 10 U.S.C. § 850 (1982) relates to the admissibility of records of courts of inquiry.

the Mainz Military Community; and (6) an insufficiency of the evidence to establish the two offenses in issue beyond a reasonable doubt. In addition, the appellant raises certain ancillary issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A.1982). We find no error and affirm.

We have determined from a review of the entire record that the first, third, fifth, and sixth assignments of error are nonmeritorious and no not warrant further discussion.

Concerning the admission into evidence at trial of the prior testimony of the alleged victim, Heidi C., we find (1) that she took the stand in open court and provided several pages of foundational-type testimony;[4] (2) that she became emotionally distraught during her testimony and, notwithstanding extensive efforts by the trial counsel and the military judge to encourage her to testify fully regarding the charged offenses, was psychologically unable to do so; (3) that the trial judge's determination of unavailability as factually sound and legally correct; (4) that the transcript of her pretrial testimony was for all intents and purposes verbatim;[5] and (5) that, in spite of an oral averment by the detailed defense counsel to the contrary, the prior testimony was in fact obtained under circumstances and in a manner reflecting both an opportunity and similar motive to develop that evidence. Accordingly, we conclude that the substitute testimony was properly admitted, that it was buttressed by sufficient indicia of reliability, and that there was no result-

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[4] During this testimony, the court members were afforded an opportunity, albeit a limited one, to observe the actions and demeanor of the alleged victim and to evaluate her worthiness of belief.

[5] *See generally United States v. Lashley*, 14 M.J. 7 (C.M.A. 1982); *United States v. Griffin*, 17 M.J. 698 (A.C.M.R. 1983). We are unpersuaded that recorded responses such as "um-hum" do not in fact accurately and completely reflect the muted verbal utterances of the youthful witness.

ing abridgement of the right of confrontation. *See* Mil. R.Evid. 804(a)(2) and 804(b)(1); *United States v. Connor*, 19 M.J. 631 (N.M.C.M.R.1984); *United States v. Hubbard*, 18 M.J. 678 (A.C.M.R.), *pet. granted*, 19 M.J. 216 (C.M.A.1984); *United States v. Kelly*, 15 M.J. 1024 (A.C.M.R.), *pet. denied*, 17 MJ. 22 (C.M.A.1983); *Ohio v. Roberts*, 448 U.S. 56, 73, 100 S.Ct. 2531, 2542, 65 L.Ed. 2d 597 (1980); *California v. Green*, 399 U.S. 149, 165-66, 90 S.Ct. 1930, 1938-39, 26 L.Ed.2d 489 (1970); *Mattox v. United States*, 156 U.S. 237, 240-44, 15 S.Ct. 337, 338-40, 39 L.Ed. 409 (1895); *United States v. Johnpoll*, 739 F.2d 702, 710 (2d Cir.1984); *cert. denied*, —— U.S. ——, 105 S.Ct. 571, 83 L.Ed.2d 511 (1984), *reh'g denied*, —— U.S. ——, 105 S.Ct. 982, 83 L.Ed.2d 983 (1985); *United States v. Pizarro*, 717 F.2d 336, 349 7th Cir. 1983); *United States v. King*, 713 F.2d 627, 630 (11th Cir.1983); *cf. United States v. Barror*, 20 M.J. 501 (A.F.C.M.R.1985) (admission, under residual hearsay exception, of out-of-court statement by 14-year-old male alleged victim of sodomy offense did not violate confrontation clause of Sixth Amendment where circumstantial guarantees of trustworthiness present); *United States v. Henderson*, 18 M.J. 745 (A.F.C.M.R.), *pet. denied*, 19 M.J. 243 (C.M.A.1984) (admission under residual hearsay exception of out-of-court statement by female teenaged alleged victim of sexual misconduct not violative of confrontation clause of Sixth Amendment where circumstantial guarantees of trustworthiness present).

Appellant's other principal assignment of error relates to the expert testimony of Dr. Vanderwalle, a child psychiatrist assigned to the 97th General Hospital in Frankfurt, who provided treatment to Heidi C. in the nature of remedial psychotherapy over a four-month period. We read Dr. Vanderwalle's testimony as being particularly relevant, insightful, and balanced. The record also reflects that he was a cautious and circumspect witness who was reluctant to extend his testimony to matters relating

directly to Heidi's credibility or an ultimate issue in the case. Such testimony, even by an expert witness,[6] can result in prejudicial error. *United States v. Cameron*, 21 M.J. 59 (C.M.A.1985) (in light of weakness of government's case against accused on charge of carnal knowledge of his adopted 12-year-old daughter, testimony on direct examination by social worker for Army Community Services to the effect that alleged victim's account of the incident was believed to be truthful constituted prejudicial error).

In the present case, the evidence of record indicates that the defense opened the door and, as a practical matter, adduced and developed the credibility and ultimate-issue testimony now alleged to have been improperly admitted. To illustrate, on cross-examination Dr. Vanderwalle was invited to testify (1) in the terminology of "sexual molestation" (R. 379); (2) as to Heidi's credibility and, more specifically, regarding her ability to "fabricate a story" (R. 386); (3) concerning the witness's personal belief with respect to Heidi's allegations against the appellant as reflected in the transcript of the Article 32 proceedings (R. 394); and (4) regarding the witness's personal opinion as to the accuracy of Heidi's report of an earlier sexual incident involving two young boys (R. 398). Under these circumstances, it is apparent that any error relating to the breadth of Dr. Vanderwalle's testimony was defense induced and therefore constitutes an inappropriate predicate for appellate relief. *See United States v. Moore*, 15 M.J. 354 (C.M.A.1983) (Cook, J. with Fletcher, J. concurring in the result) (in rape prosecution where alleged victim was 18-year-old civilian female and only contested issue was that of

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[6] Section VII of the Military Rules of Evidence contemplates comprehensive and far-reaching testimony by those judicially recognized as expert witnesses. Such testimony may even extend to an ultimate issue to be decided by the triers of fact. Mil. R. Evid. 704.

consent, expert testimony on merits held revelant and admissible); [7] *State v. Myers*, 359 N.W.2d 604 (Minn. 1984) (it is within the trial court's discretion to admit qualified expert testimony describing the psychological and emotional characteristics typically observed in sexually abused children and those observed in the 7-year-old complainant and giving other background data providing a relevant insight into the conduct and demeanor of the child complainant which the jury could not otherwise bring to its evaluation of credibility; [8] defendant opened the door to opinion testimony regarding the truthfulness of child's allegations); *cf. United States v. Snipes*, 18 M.J. 172 (C.M.A.1984) (in a trial by general court-martial where accused was charged with sodomy and indecent acts with his teen-aged adopted daughter, the military judge did not abuse his discretion in permitting government rebuttal witnesses to testify as there exists a sufficient body of knowledge as to the typical behavior of sexually abused children and their families to permit certain conclusions to be drawn by experts as to such behavior patterns); *United States v. Tomlinson*, 20 M.J.

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[7] The lead opinion in *United States v. Moore* also makes the point that, if an alleged rape victim is incapable of understanding the act of sexual intercourse or of consenting to it, expert testimony as to her incapacity would be relevant to establish her disability and its consequences on her will to resist. *United States v. Moore*, 15 M.J. at 362.

[8] Consistent with the analysis and posture of what appears to be a growing number of courts concerning this issue, the Supreme Court of Minnesota explained the pertinent evidentiary dilemma, as follows:

> In the case of a sexually abused child consent is irrelevant and jurors are often face with determining the veracity of a young child who tells of a course of conduct carried on over an ill-defined time frame and who appears an uncertain and ambivaleant accuser and who may even recant. Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and

897 (A.C.M.R.1985) (in rape prosecution where alleged victim was female, active-duty Staff Sergeant, social worker's rebuttal testimony concerning whether that non-commissioned officer was suffering post-traumatic stress disorder which was consistent with rape trauma syndrome should have been excluded under Mil.R.Evid. 403); *People v. Bledsoe*, 36 Cal.3d 326, 203 Cal. Rptr. 450, 681 P.2d 291 (1984) (expert testimony that 14-year-old alleged rape victim suffered from rape trauma syndrome not admissible to show that rape in fact occurred but may be admitted for other purposes; the error did not affect the judgment; *People v. Roscoe*, 168 Cal.App.3d 1093, 215 Cal.Rptr. 45 (1985) (although psychologist's testimony to the effect that 15-year-old complainant was molested was erroneously admitted, expert testimony may properly be admitted for some purposes and error was nonprejudicial). In any event, residual prejudice to appellant's substantial rights cannot reasonably be determined to have resulted from Dr. Vanderwalle's testimony, in light of the balance of the component evidence on the merits.

Finally, we have analyzed sua sponte the findings of guilty to ascertain if the two indecent liberties specifications are multiplicious for any purpose and have determined from the evidence of record that they are not.

Perceiveng no basis for findings or sentence relief, we hereby affirm the findings of guilty and the sentence.

Senior Judge MARDEN and Judge LYMBURNER concur.

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appropriate in cases of sexual abuse of children, and particularly of children as young as this complainant. (Citations omitted.)

State v. Myers, 359 N.W.2d at 610.

UNITED STATES COURT OF MILITARY APPEALS

No. 54284

CM 44358

UNITED STATES,

Appellee,

v.

ANDREW L. ARRUZA, CAPTAIN, U.S. ARMY,

Appellant.

July 18, 1988

For appellant: *Major Marion E. Winter* (argued), *Homer A. Walkup* (on brief), *Captain Carolyn F. Washington.*

For appellee: *Captain Thomas L. Herrington* (argued), *Colonel Norman G. Cooper, Lieutenant Colonel Gary F. Roberson, Lieutenant Colonel Larry D. Williams, Captain Tarek Sawi* (on brief), *Major Robert L. Swann.*

OPINION

COX, Judge:

Chaplain (Captain) Andrew L. Arruza was tried by general court-martial composed of officer members at Mainz-Gonsenheim, Federal Republic of Germany. He was charged with raping and sodomizing a female under 16 years of age, in violation of Articles 120 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 925, respectively. Contrary to his pleas, he was found guilty of two specifications of the lesser-included offense of taking indecent liberties with a female under the age of 16, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

He was sentenced to confinement for 5 years, dismissal from the service, and forfeiture of $2,000 pay per month for 60 months. The convening authority approved the sentence, and the Court of Military Review affirmed the findings and sentence. 21 M.J. 621 (1985).

This Court granted review of an issue raised by appellate defense counsel and specified a second. The granted issue questions:

> WHETHER THE MILITARY JUDGE ERRED IN ADMITTING, OVER DEFENSE OBJECTION, AS PROSECUTION EVIDENCE IN CHIEF, TESTIMONY RENDERED AT A PRETRIAL INVESTIGATION BY A SIX-YEAR-OLD CHILD TO THE EFFECT THAT SHE HAD BEEN MOLESTED BY APPELLANT.

At the time of the offenses, the victim was 6 years old. Her mother, an Army Sergeant, had been seeing appellant socially. The child testified under oath against appellant at the Article 32, UCMJ, 10 U.S.C. § 832, investigation, and the Government produced her as a witness at the court-martial. However, through a combination of trial maneuvers and apparent [1] intimidation, civilian defense counsel succeeded in silencing the victim at the court-martial. The result was that she became unavailable as a witness, and the military judge granted the Government's motion to admit the victim's Article 32 testimony into evidence.[2]

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[1] The defense portrays the result of their tactics, i.e., silencing the victim, as establishing that she was unable to perpetrate the lie when confronted with the truth. Certainly, this is one possible inference. Another is that the defense was scared to death of what she would say if permitted to testify. Suffice it to say, enough of the antics were conducted in front of the members to permit them to draw their own conclusions.

[2] Another witness for the prosecutions was a social worker—a "child advocate." This witness testified *in rebuttal* as to a sup-

Appellant reasserts here, as he did at trial, that the Article 32 examination was conducted solely for the purpose of discovery and, thus, lacked a "similar motive" as required for admissibility under Mil.R.Evid. 804(b)(1), Manual for Courts-Martial United States, 1969 (Revised edition). That rule states:

> *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former testimony.* Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an oppportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

Appellant and military counsel were present at the Article 32 hearing. Defense counsel examined the child extensively about her testimony. Throughout the lengthy cross-examination, the child's story remained essentially

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posed "child abuser profile." The purport of her testmiony, in conjunction with the instructions provided by the military judge, was that the mere fact that appellant was educated, a chaplain, a professional, etc., did not assure that he could not have committed the crimes; child-abuse crimes have been committed by persons with such credentials. We do not comment on the propriety of such testimony as the issue is not presently before the Court.

unchanged. At the court-martial, the military judge entered special findings that defense counsel's cross-examination at the Article 32 hearing had a two-fold purpose: impeachment and discovery.

This Court has long held that "[d]iscovery is not a prime object to the pretrial investigation." *United States v. Eggers*, 3 U.S.C.M.A. 191, 194, 11 C.M.R. 191, 194 (1953). Furthermore, regardless of defense counsel's assertions, the opportunity to cross-examine the witness was available to and used by him.

The "substantially verbatim" record of the child's Article 32 testimony, given under oath, was properly admitted into evidence against appellant and satisfies both the requirements of Mil.R.Evid. 804(b)(1) and the confrontation clause of the Sixth Amendment. *Ohio v. Roberts*, 448 U.S. 56, 67, 100 S.Ct. 2531, 2540, 65 L.Ed.2d 597 (1980); *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). *See also United States v. Crockett*, 21 M.J. 423 (C.M.A.), *cert. denied*, —— US. ——, 107 S.Ct. 130, 93 L.Ed.2d 74 (1986), where Chief Judge Everett, writing for the Court, held that witnesses who lived in Florida and refused invitational travel orders to attend trial were "unavailable" for purposes of determining admissibility of their videotaped depositions; and because accused and his defense counsel were present and had an opportunity to object to testimony offered on direct examination and to cross-examine the witnesses, use of videotaped depositions did not deprive the accused of his Sixth Amendment right to confrontation.

We specified the second issued to determine:

> WHETHER THE MILITARY JUDGE ERRED IN ALLOWING MAJOR VANDERWALLE TO TESTIFY THAT HE BELIEVED THAT THE VICTIM HAD HAD ONE OR MORE SEXUAL ENCOUNTERS WITH APPELLANT AND THAT

THE VICTIM BELIEVED THAT SHE HAD HAD A SEXUAL ENCOUNTER WITH HIM.

Dr. (Major) Michael B. Vanderwalle,* an expert in the field of child psychiatry, had examined the victim on several occasions. Over defense objection, the doctor was permitted to relate in considerable detail the content of statements made by the victim to him regarding what appellant had allegedly done to her. These statements were received as medical-history evidence under Mil.R. Evid. 803(4). The statements very closely matched the victim's Article 32 testimony. The doctor also explained how young childrens' perceptions are frequently exaggerated and distorted. He explained why children often delay in reporting such traumatic incidents, and he described the psychiatric traits and characteristics of children who had been sexually abused. He further opined that the victim displayed many of these traits and characteristics.[3]

At the outset, the Government acknowledged the impropriety of asking Dr. Vanderwalle whether he "believed" the victim's account of events. During recross-examination, however, *defense counsel* asked Dr. Vanderwalle about the credibility of the victim's claims.[4]

[* Reporters' Note: The record also spells the name as Vandewalle.]

[3] On a personal note, the "Dear Abby" column that appeared in the Fairfax Journal on September 24, 1987, provides the best concept I've seen to date of what victims of sexual abuse might experience, and it highlights some of the trauma which abused children endure. I took the time to obtain permission to reprint it, in toto, albeit such is probably not required in a legal opinion, for the benefit of all who might deal with these cases. *See* Appendix.

[4] The series culminated with this exchange:

> Q. If in fact the things . . . [the victim] described at the Article 32—and I believe you said you read the transcript—had happened, would you expect her to be a very very disturbed and upset child?
>
> A. How do . . .

[Continued]

When the doctor concluded his testimony, the court members presented several questions to the military judge for review. Relying on Mil.R.Evid. 704, which provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the

---

[4] [Continued]

Q. *Or didn't you believe that any of that was possible?*

A. Of what?

Q. *Or didn't you believe that any of that was possible?*

A. Of what—any of what?

Q. *What you read in the 32 transcript.*

A. I believe something could have happened, but I didn't necessarily believe all the stuff that was in the 32.

(Emphasis added.) Immediately after the doctor answered the questions, individual defense counsel barraged him with another series of questions, as follows:

Q: . . . are you telling us that you believe that . . . [the victim] was penetrated on seven to nine occasions by the accused?

A: No, I'm not. I don't think she was penetrated on seven to nine occasions.

Q: Are you telling us that . . . [the victim] was forced to commit fellatio of the accused?

A: Can I state what I believe?

Q: Is that what you're telling us?

A: I'm—what I'm saying is that she was sexually molested by touching on at—on some occasions.

* * * *

Q: She also says that she was raped; that she was penetrated; thart she was forced . . .

A: Right. There is where I would disagree with what she says, because I think that's—she doesn't have a concept of what happened, but that is not what happened. Again, we get actually being penetrated, per se. She has an idea that that's into this issue of distortion from this age group on what actually penetration is; what actually happened in her body.

trier of fact," the judge ruled that the following questions could be asked.

> In your professional opinion do you believe that . . . [the child] had a sexual encounter—one or more—with Captain Aruzza?
>
> Second part. Does . . . [the child] believe that she did have a sexual encounter with Captain Arruza?

The doctor's answer to both was in the affirmative.

This Court has consistently held that child-abuse experts are not permitted to opine as to the credibility of victims or other witnesses. *United States v. Petersen*, 24 M.J. 283 (C.M.A.1987); *United States v. Deland*, 22 M.J. 70 (C.M.A.), *cert denied*, —— U.S. ——, 107 S.Ct. 196, 93 L.Ed.2d 128 (1986); *United States v. Cameron*, 21 M.J. 59 (C.M.A.1985). This holding is consistent with the decisions of Federal Circuit courts. *See United States v. Azure*, 801 F.2d 336 (8th Cir.1986). However, the rationale for this rule has varied. For example, in *United States v. Cameron*, *supra* at 62, we found that "[t]his testimony goes beyond the area of inquiry permitted by Mil.R.Evid. 608(a)," dealing with evidence of truthful character. Also, we have recognized that the testimony goes beyond the scope of the expertise of the witness who is not trained to be an expert with "specialized knowledge . . . to determine if a child-sexual-abuse victim was telling the truth." *United States v. Petersen*, *supra* at 284.

It also has been said that to permit an expert to opine as to the truthfulness of the victim puts "an impermissively qualified expert's stamp of truthfulness on a witness' story [and] goes too far," *United States v. Azure*, *supra* at 340; and "that [a]n expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.'" *Id.*, *quoting United States v. Samara*, 643 F.2d 701, 705 (10th Cir.),

cert. denied, 454 U.S. 829, 102 S.Ct. 122, 70 L.Ed.2d 104 (1981), *quoting United States v. Ward*, 169 F.2d 460, 462 (3d Cir.1948).

We recognize that the Military Rules of Evidence seem to invite the unwary to ask the expert whether he or she "believes the victim." Such information will often appear to "assist the trier of fact to understand the evidence or to determine a fact in issue." Mil.R.Evid. 702. Further, the expert's belief in the truthfulness of a victim may be essential to a diagnosis and treatment and, therefore, is the type of information "reasonably relied upon by experts in the particular field" of child abuse. Mil.R.Evid. 703. After all, how can the expert possibly determine how to help the child unless fantasy can be separated from reality? Moreover, opinions are not barred even if they relate to the "ultimate issue," Mil.R. Evid. 704; and the credibility of the victim is normally the "ultimate issue" in these cases.

It is, therefore, the interaction between Military Rules of Evidence 608(a), as it pertains to character evidence; 403, as it pertains to confusing the triers of fact (usurping their function); and the 700-series as they pertain to the use of experts, to which we must ultimately look for admissibility of the evidence. Based upon our study of the law in this area, we see no need to relax the general rule regarding the scope of the expert's opinion in child-abuse cases.

Returning to the facts of this case, the members' question to Dr. Vanderwalle, "do you believe that . . . [the child] had a sexual encounter," technically ran afoul of the rule and, therefore, should not have been permitted. The other question, "[d]oes . . . [the child] believe that she did have a sexual encounter," is likewise objectionable under a strict application of the rule. Whether the error requires reversal presents a different question; however, admission of the two answers was

harmless. Art. 59(a), UCMJ, 10 U.S.C. § 589(a); *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985).

Several reasons exist for reaching this conclusion. As indicated, during recross-examination of Dr. Vanderwalle, defense counsel asked several questions dealing with whether the victim might have been lying or fantasizing. This line of questioning opened the door for the members to ask the questions now challenged before us.

Further, since the doctor's professional diagnosis was that the victim bore the psychiatric scars of having been molested, it is self-evident that he must have regarded her statements as credible at least to that extent. *See State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (Ore. 1983).

Moreover, it may be quite relevant to a diagnosis that the expert's opinion was premised upon the assumption that the victim was truthful. *See Ward v. State*, 519 So.2d 1082 (Fla.App., 1988). Such testimony, however, should be accompanied by cautionary instructions that the witness is not being offered as an expert in "truth-telling" and that the opinion is relevant only to assist the court members in understanding the medical diagnosis. The members should be reminded that it is *their* responsibility to make the determination of truthfulness.

Under the circumstances here, no error which prejudiced a substantial right of appellant is found. Art. 59 (a).

The decision of the United States Army Court of Military Review is affirmed.

– –

APPENDIX

Promises, Promises—A Child's View of Incest

I asked you for help and you told me you would if I told you the things my dad did to me. It was really hard for me to say all those things, but you told me to trust you—then you made me repeat them to 14 different stangers.

I asked you for privacy and you sent two policemen to my school in front of everyone, to "go downtown" for a talk in their black and white car—like I was the one being busted.

I asked you to believe me, and you said that you did, then you connected me to a lie detector, and took me to court where lawyers put me on trial like I was a liar.

I can't help it if I can't remember times or dates or explain why I couldn't tell my mom. Your questions got me confused—my confusion got you suspicious.

I asked you for help and you gave me a doctor with cold metal gadgets and cold hands . . . just like my father, who said it wouldn't hurt, just like my father, who said not to cry. He said I look fine—good news for you. You said, bad news for my "case."

I asked you for confidentiality and you let the newspaper get my story. What does it matter that they left out my name when they put in my father's and our home address? Even my best friend's mother won't let her talk to me anymore.

I asked for protection and you gave me a social worker who patted my head and called me "Honey" (mostly because she could never remember my name). She sent me to live with strangers in another place, with a different school.

Do you know what it's like to live where there's a lock on the refrigerator, where you have to ask permission to use the shampoo, and where you can't use the phone to call your friends?

You get used to hearing, "Hi, I'm your new social worker, this is your new foster sister, dorm mother, group home." You tiptoe around like a perpetual guest and don't even get to see your own puppy grow up.

Do you know what it's like to have more social workers than friends?

Do you know what it feels like to be the one that everyone blames for all the trouble?

Even when they were speaking to me, all they talked about was lawyers, shrinks, fees—and whether or not they'll lose the mortgage.

Do you know what it's like when your sisters hate you, and your brother calls you a liar? It's my word against my own father's. I'm 12 years old and he's the manager of a bank. You say you believe me—who cares, if nobody else does?

I asked you for help and you forced my mom to choose between us—she chose him, of course. She was scared and had a lot to lose. I had a lot to lose too—the difference was you never told me how much.

I asked you to put an end to the abuse—you put an end to my whole family. You took away my nights of hell and gave me days of hell instead. You've exchanged my private nightmare for a very public one.

—FEELINGS BY CINDY, AGE 12;

PUT INTO WORDS

BY KEE MacFARLANE

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SULLIVAN, Judge (concurring in the result):

I believe the proper scope for expert testimony in this type of case was articulated in *United States v. Azure*, 801 F.2d 336, 340 (8th Cir.1986):

> We agree that in these types of special circumstances some expert testimony may be helpful, but putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far in present circumstances. Dr. ten Bensel might have aided the jurors without usurping their exclusive function by generally testifying about a child's ability to separate truth from fantasy, by summarizing the medical evidence and expressing his opinion as to whether it was consistent with Wendy's story that she was sexually abused, or perhaps by discussing various patterns of consistency in the stories of child sexual abuse victims and comparing those patterns with patterns in Wendy's story. However, by going further and putting his stamp of believability on Wendy's entire story, Dr. ten Bensel essentially told the jury that Wendy was truthful in saying that Azure was the person who sexually abused her. No reliable test for truthfulness exists and Dr. ten Bensel was not qualified to judge the truthfulness of that part of Wendy's story. The jury may well have relied on his opinion and "surrender[ed] their own common sense in weighing testimony. . . ." [*United States v.*] *Barnard*, 490 F.2d [907] at 912 [(9th Cir. 1973), *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974)].

In the present case this line was crossed but only after the defense crossed the line itself. Accordingly, I would affirm because the defense opened the door for this testimony from Dr. Vanderwalle. *See generally* Art. 59(a), Uniform of Military Justice, 10 U.S.C. § 859(a).

EVERETT, Chief Judge (dissenting):

I agree with Judge Sullivan's view of the proper scope of expert testimony. However, I do not agree with Judge Sullivan that the defense opened the door and, under the circumstances of this case, I would hold the error was prejudicial. Accordingly, I vote to grant a rehearing.

IN THE UNITED STATES
COURT OF MILITARY APPEALS

PETITION FOR RECONSIDERATION

CM 445358

Docket No. 54,284/AR

CAPTAIN ANDREW L. ARRUZA,
056-32-5107, UNITED STATES ARMY,
Petitioner,

v.

UNITED STATES,
Respondent.

TO THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS:

The Court is requested to reconsider its decision, dated 18 July 1988, in the case of *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988), for the following reasons:

I

In light of the United States Supreme Court holding in *Coy v. Iowa*, —— U.S. ——, 56 U.S.L.W. 4931 (June 29, 1988), admission of the Article 32 statement of the alleged victim denied petitioner the right at his trial to confront face-to-face the primary witness against him.

II

The cumulative effect of permitting the introduction of impermissible testimony by both Major Vanderwalle and Mrs. Ogilvy-Lee deprived petitioner of a fair trial.

Argument

Shortly before this Court anounced its decision in petitioner's case, the Supreme Court issued an important opinion in the case of *Coy v. Iowa*, —— U.S. ——, 56 U.S.L.W. 4931 (June 29, 1988), which firmly establishes that all criminal accused have a constitutional right to confront face-to-face the witnesses against them before the trier of fact. This holding has direct application to petitioner's case and needs to be addressed by both counsel and the Court. Specifically, petitioner submits that *Coy v. Iowa* prohibits the introduction into evidence of an alleged victim's recorded statements from an Article 32 investigation where admissibility is based upon the refusal of the same witness to testify fully and truthfully at the subsequent court-martial. Misconduct (i.e., refusing to testify truthfully at trial) by the government's sole witness cannot be used in the name of public policy to shield that witness from effective confrontation.

The case of *Coy v. Iowa* involved the prosecution of an individual for the sexual assault of two 13-year-old girls who both testified at his trial; however, their testimony involved the use of a screening device which was authorized by Iowa statute. The screening device permited unobstructed views of the female witnesses by all trial participants, but did allow the witnesses to avoid viewing the defendant. Writing for the majority (6-2), Justice Scalia summarized the protections of the Confrontation Clause as follows:

> We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact . . . intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." More recently, we have de-

> scribed the "literal right to 'confront' with witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause."

56 U.S.L.W. 4932-33 (citations omitted). In reaching its decision, the majority relied in part on the very same two cases cited by Judge Cox as authority for limiting petitioner's right of confrontation—*California v. Green*, 399 U.S. 149 (1970), and *Ohio v. Roberts*, 448 U.S. 56 (1980). 26 M.J. at 236.

Of course, none of these cases stand for the proposition that an otherwise available witness, who is physically present in the courtroom, may be effectively shielded from a criminal defendant's right of confrontation by the simple act of refusing to testify. Moreover, inherent indicia of reliability are lacking as well as traditional guarantees of trustworthiness. For example, the Article 32 statements contained substantial falsehoods which were subsequently recanted by the alleged victim (R. 251). The Article 32 investigation has no foundation in common law and is most similar to courts of inquiry where use of its testimony is specifically limited by statute. *See* Issue Presented II, Supplement to Petition for Grant of Review at 34-44; *compare* Article 50, UCMJ, *with* Mil.R.Evid. 804(b)(1).

At Footnote 2 of Judge Cox's opinion, reference is made to rebuttal testimony of a social worker, Mrs. Ogilvy-Lee, which was improperly presented over objection to refute petitioner's "good soldier" defense by depicting appellant as an individual who meets the "child abuser profile." Judge Cox elected not to address this serious error because he concluded: "We do not comment on the propriety of such testimony as the issue is not presently before the Court." This is incorrect. Petitioner specifically asserted that this improper testimony constituted prejudicial error. *See* Issue Presented VI, Supplement for Grant of Review at 64-70. Even though the Court did not specifically grant review on

that issue and request further briefs on the asserted error, the Court has a continuing obligation to insure that each appellant has received a fair trial. Since all three judges of the Court found error in admitting Major Vanderwalle's testimony as to his personal beliefs concerning commission of criminal acts by petitioner and the credibility of the alleged victim, then that error must be weighed individually and collectively with all other identified error for prejudice under Article 59(a), UCMJ. It is a denial of fundamental fairness to leave unresolved significant issues on appeal that have been raised in a timely manner and have a direct impact upon the findings of guilt.

Conclusion

Petitioner requests that this Court grant his Petition for Reconsideration, vacate its decision of 18 July 1988, and order the filing of additional briefs under Rule 25.

ANDREW L. ARRUZA

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Arruza*, CM 445358, Docket No. 54,284/AR, was mailed to the Court and was delivered to Colonel Norman G. Cooper, Chief, Government Appellate Division, on 28 July 1988.

Charles A. Famoso, Jr.
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UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54284/AR
CMR Dkt. No. 445358

UNITED STATES,
Appellee

v.

ANDREW L. ARRUZA (056-32-5107),
Appellant

ORDER DENYING PETITION
FOR RECONSIDERATION

On consideration of appellant's petition for reconsideration of this Court's deciison (26 M.J. 234), it is by the Court this 22nd day of September, 1988

ORDERED:

That said petition for reconsideration be, and the same is, hereby denied.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (WALKUP, Esq.)
Appellate Government Counsel (HITZEMAN)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

* * * *

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * *

To raise and support Armies, but no Appropriations of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

* * * *

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

* * * *

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNIFORM CODE OF MILITARY JUSTICE, TITLE 10, U.S. CODE, CH. 47

10 U.S. Code § 850, Art. 50. UCMJ. Admissibility of records of courts of inquiry

(a) In any case not capital and not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial or military commission if the accused was a party before the court of inquiry and if the same was involved or if the accused consents to the introduction of such evidence.

(b) Such testimony may be read in evidence only by the defense in capital cases extending to the dismissal of a commissioned officer.

(c) Such testimony may also be read in evidence before a court of inquiry or a military board.

MILITARY RULES OF EVIDENCE M.R.E. 804

Rule 804. Hearsay exceptions; declarant unavailable

(a) *Definitions of unavailability.* "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendence (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or

(6) is unavailable within the meaning of Article 49(d)(2).

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) *Former testimony.* Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. *This paragraph is subject to the limitations set forth in Articles 49 and 50.* [Italics supplied for emphasis.]

INITIAL REGULATIONS IMPLEMENTING ART. 50, UCMJ, MCM 1951

33. ¶ 126 *a.*, page 207:

> In any case in which the sworn testimony contained in the proceedings of a court of inquiry is read in evidence pursuant to the provisions of Article 50, the maximum punishment which may be imposed for an offense committed either in time of peace of in time of war shall not extend to death or to the dismissal of an officer (see Art. 50a). The foregoing limitation does not apply where such testimony is read in evidence by the defense (see Art. 50b). Where such testimony does not enter into proof of all the specifications, the limitation applies only to those specifications into which it enters.

* * * *

UNIFORM CODE OF MILITARY JUSTICE, TITLE 10, U.S. CODE

§ 830. Art. 30. Charges and specifications

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

* * * *

§ 832. Art. 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or

mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examining and to offer any new evidence in his own behalf.

(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

UNIFORM CODE OF MILITARY JUSTICE, REVIEW PROVISIONS

§ 866. Art. 66. Review by Court of Military Review

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. . . .

* * * *

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

§ 867. Art. 67. Review by the Court of Military Appeals.

(a) (1) There is a United States Court of Military Appeals established under Article 1 of the Constitution of the United States and located for administrative purposes only in the Department of Defense. The court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of the court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or the highest court of the State. Each judge is entitled to the same salary and travel allowances as are, and from time to time may be provided for judges of the United States Court of Appeals, and is eligible for reappointment. The President shall designate from time to time one of the judges to act as chief judge. The chief judge of the court shall have precedence and preside at any session which he attends. The other judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age. The court may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum. A vacancy in the court does not impair the right of the remaining judges to exercise the powers of the court.

* * * *

(b) The Court of Military Appeals shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;

(2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals

(3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.

* * * *

(d) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Military Review. In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.

* * * *

(h) (1) Decisions of the Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under such section any action of the Court of Military Appeals in refusing to grant a petiiton for review.

(2) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

UNIFORM CODE OF MILITARY JUSTICE, PUNITIVE ARTICLES, TITLE 10, U.S. CODE

§ 920. Art. 120. Rape and Carnal Knowledge.

(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

* * * *

§ 925. Art. 125. Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

* * * *

§ 934. Art. 134. General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to being discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

MILITARY JUSTICE ACT OF 1983, PL 98-209,
Approved December 6, 1983

Sec. 11. (a) Section 1552 of title 10, United States Code, [codification of Section 207 of the Legislative Reorganization Act of 1946, which, as a substitute for the introduction of private bills for the correction of military and naval records, authorized such correction by the Secretaries of military departments, acting through civilian boards] is amended by adding at the end thereof the following new subsection:

"(f) With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title [the Uniform Code of Military Justice] (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) [basic correction of records authority] may extend only to—

"(1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or

"(2) action on the sentence of a court-martial for purposes of clemency."

DETAILED FACTUAL SITUATION

Petitioner arrived in Mainz on November 7, 1982, for duty as battalion chaplain to the First Battalion, 39th Air Defense Artillery Division, the Battalion Commander being Lieutenant Colonel Richard A. Murray. He obtained an apartment on the seventh floor of a high-rise building in Lerchenberg. He at all times lived alone in that apartment, but frequently entertained house guests, some for several days at a time. Some of the house guests entertained came from the United States and stayed in his apartment while visiting Germany.

Upon arriving in Germany, he attended "Gateway" classes in German language and culture. In these classes he met a single woman Staff Sergeant, who had served in the Medical Department of the Army for some eleven years, and who was to be assigned to the 279th Station Hospital in Mainz. He and the woman had dinner together, and on one occasion went to his apartment, where they engaged in sexual intercourse. The woman at no time lived in his apartment, but occupied a hotel room until such time as quarters could become available.

The woman Staff Sergeant was the single parent of a six-year old child, Heidi, who was being kept by a friend in the United States, but who was to join her mother in Germany at the beginning of the New Year, 1983. The mother had been excommunicated from the Church of Jesus Christ of Latter Day Saints (Mormon), but continued to attend chapel services of that denomination. At such services she met a Mrs. Gail Wilcox, the wife of an enlisted member of the Army, stationed in Germany. When Mrs. Wilcox learned that Heidi would be coming to Germany, she offered to care for Heidi, along with her own five children, and send Heidi to school, during working days, and to care for Heidi overnight at such times as Heidi's mother might be on night duty. Mrs. Wilcox insisted that both Heidi and Heidi's mother should leave

the hotel and come to live with her family until such time as they could obtain quarters of their own.

Near the end of 1982, the Staff Sergeant telephoned petitioner, stating that Heidi would arrive on New Year's Day, and inviting petitioner to come to the hotel and meet Heidi. Petitioner had a guest from the United States staying in his apartment, and went alone to the hotel. He perceived that Heidi was biracial. The three walked in a nearby park, after which he returned to his apartment. He was away from Mainz on a field problem during two weeks in January. During this time, Heidi and her mother moved into the Wilcox home, and petitioner did not see either of them during the time they were living there.

Around the first of February, 1983, petitioner learned that the Staff Sergeant and Heidi had moved into an apartment which was some ten minutes driving time distant from the apartment house in which petitioner lived. A route from the Wilcox home, where the mother would pick Heidi up at the end of the working day, to the apartment in which she lived with Heidi, passed by the apartment house in which petitioner lived. Heidi remembered petitioner, whom she called "Andy," and would look to see if a distinctive blue van which he drove was parked in the apartment house lot. When she saw the van, she would insist that she and her mother go to see "Andy." Petitioner actually regarded these visits as intrusive, and would usually terminate them at the door, sometimes representing that he was on call or had official matters to attend to. On a few occasions—petitioner can recollect no more than five—Heidi and her mother were invited into the apartment. At some times they would watch television, and Heidi would sit on petitioner's lap, and would undertake to comb petitioner's hair. She seemed affectionate, but at no time gave the impression of being seductive.

On two occasions only was petitioner alone in his apartment with Heidi. On these occasions Heidi suggested that they have dinner together, and Heidi's mother indicated that she would go to their apartment, procure some prepared food and return. Heidi's mother testified that she was away for no more than twenty minutes on either occasion. On one of these occasions, petitioner prepared a salad and set the table, and Heidi scribbled on some note paper that petitioner kept by his telephone. When the mother returned, she remonstrated with Heidi for having wasted so much of petitioner's notepaper, but noted nothing remarkable in Heidi's demeanor or appearance, and when they sat down for dinner, Heidi asked the blessing. On the second occasion, Heidi and her mother had come to petitioner's apartment on a Saturday afternoon, to watch a television performance that they were unable to receive on their set. When Heidi suggested dinner, petitioner responded that he did not have enough food in the house for the three. Heidi's mother drove to their apartment, procured salad makings, and returned, while petitioner remained in the kitchen preparing a pizza from scratch. Heidi did not come into the kitchen, and petitioner assumes that she continued to watch television. Again, Heidi's mother noted nothing of a suspicious nature, and the three ate dinner together, Heidi saying grace.

On one occasion when Heidi and her mother came to petitioner's apartment, Heidi's mother brought pajamas for Heidi, and changed Heidi's clothing while petitioner cleaned up the kitchen. Heidi later went to sleep on the couch while they were watching television, and petitioner, accompanied by Heidi's mother, carried Heidi into his bedroom and put her into his bed. Later, when Heidi's mother was leaving, she went down to the parking lot and started the engine to warm her automobile. Petitioner carried Heidi, attired in her pajamas, down in the apartment house elevator, and out to her mother's car,

where he put her into the back seat. Heidi squirmed at some times, but did not awaken, as petitioner was carrying her down to her mother's car.

At no time after Heidi came to Germany did petitioner and Heidi's mother engage in sexual intercourse in petitioner's apartment. On one occasion only after they moved into their apartment, petitioner was invited for dinner, and after Heidi had been put to bed, petitioner and Heidi's mother engaged in sexual intercourse on the living room couch. Heidi has at no time given any occasion for belief that she may have suspected that her mother and petitioner had a sexual relationship.

Petitioner became involved with a civilian Lutheran Church group in Germany, some of the members of which were activists in opposing introduction and maintenance of atomic weapons in Germany by United States Armed Forces stationed there. One of the members of the group, a single Germany woman who held a doctorate of philosophy, entered into a liaison with petitioner. Petitioner's van bore bumper stickers espousing the anti-nuclear weapons ideology of the Lutheran group. At some time, probably during March, 1983, petitioner privately told Heidi's mother that he was engaging in a relationship with another woman, implying that there would be no further romantic contacts between them.

From the 18th day of February until the 5th or 6th of March, a woman friend of petitioner from the United States was visiting petitioner in his apartment. Heidi's mother was aware of her visit, and did not come to the apartment with Heidi during that period. In 1983, Easter Sunday fell on the 3rd of April. A male friend of petitioner, associated with the CID, was visiting petitioner in his apartment at the time. Heidi and her mother came to the apartment, and left an Easter basket for petitioner with his house guest. On a later day that week, Heidi and her mother came to petitioner's apartment and saw the petitioner. Heidi asked petitioner if

she might have a lollipop out of the Easter basket they had left. Petitioner was at that time under orders to leave Mainz and perform detached duty at a station in Germany, several hours driving time distant. Petitioner did not see Heidi again until June 27th, when she appeared as a witness against him at a pre-trial investigation.

Heidi's mother did not tell petitioner that Heidi had a history of sexual precocity and behavioral problems. She had noted that Heidi seemed to be masturbating almost since her birth, and, being in the medical department, she had consulted physicians about the condition, being told that such was nothing more than an indication of infantile curiosity and sexual experimentation. During times that Heidi's mother had been stationed successively at Fort Monmouth, New Jersey, and Fort Jackson, South Carolina, prior to going to Germany, Heidi's behavior taxed the patience of day care custodians to the extent that she never remained with the same custodian for more than three months. In September, 1981, Heidi was expelled from kindergarten at Fort Jackson for swearing at teachers and being generally unmanageable. In May-June, 1982, Heidi was being kept during days at Fort Jackson by a woman who also kept three small boys, and the four children would play together in a sandbox behind the house. On one evening when they were returning home, Heidi's mother had noted that she had sand in her panties. When questioned, Heidi said that the three small boys had been "humping" her, which she explained as meaning that they had successively put their penises into her vagina, and that they had thereafter put sand in her panties. Heidi's mother related the allegations to the custodian and to parents of the boys, but all dismissed the matter as normal sexual experimentation. Heidi's medical record at Fort Jackson indicated that she had been examined on two occasions and found to be suffering from urinary infections and vaginal erythema (unusual redness, usually due to irritation). Both Heidi

and her mother had been treated at Fort Jackson for a condition diagnosed as herpes, but with no indication as to the body area involved.

Through the summer and fall of 1982, Heidi had been kept by a woman friend of her mother, who lived with a man by whom she had three children, and whom she later married. Heidi denied that she had ever been molested by that man, saying, "The only person he does it to is his wife," but she related that a male child cousin of hers, who visited from her mother's family home in Michigan, "tries to do it to me," meaning that the cousin had tried to insert his penis into her vagina.

Heidi had been taken by her mother, who is caucasian, to see Heidi's black biological father on some 2-3 occasions, the last of which had been in August, 1982, before Heidi and her mother left the United States for a preliminary visit to Germany. The father indicated no interest in Heidi.

Heidi's mother cautioned Mrs. Wilcox, who undertook care of Heidi in Germany, that Heidi had a great deal of sexual knowledge for a child of her age. Mrs. Wilcox was careful not to allow Heidi to be behind a closed door with any of her children, and not to allow Heidi to take a three-year-old Wilcox son to bed with her during her afternoon naps. Mrs. Wilcox noted that Heidi always insisted upon being under covers while taking afternoon naps, although the apartment was quite warm, and she was warmly clad. Mrs. Wilcox suspected that she might be masturbating while seeming to be taking a nap.

The Wilcox family were devout adherents of the Mormon faith, and regularly held prayer sessions during mornings, evenings, and at meals. Children were encouraged to present their individual petitions during these prayer sessions. Heidi's petitions on these occasions were invariably that the Lord bless her and help her mommy get a daddy and a baby brother. Heidi's mother had said

to Heidi privately on some occasions that petitioner would make a good father for her, in that petitioner was a religious man, fond of good music, gentle, and patient.

DETAILS CONCERNING COURT-MARTIAL TESTIMONY OF HEIDI

The taking of testimony before members of the court at the general court-martial trial of petitioner began on the afternoon of Thursday, October 27, 1983, with Heidi being called as the first witness. She qualified as a witness, testifying as to her religious belief, church and Sunday school attendance, and the wrongfulness of telling falsehoods. She was then asked to raise her hand and swear that she would tell the truth, which she said that she would. She was asked if she would answer truthfully questions addressed her, whether propounded by the trial counsel or by counsel for the defense, to which questions Heidi answered affirmatively. Heidi had identified the petitioner as "Andy" at the outset, and after having been sworn, as indicated, she testified as to how long she had known "Andy," as to his having been a friend of her mother's before Heidi came to Germany, as to her having gone to "Andy's" apartment, as to the room layout, and as to her having eaten meals at "Andy's" house. Heidi began to fail to answer questions, finally stating that she was not answering because the civilian defense counsel for petitioner would say that she was lying. The court was recessed briefly. When questioning of Heidi was resumed, the defense counsel correctly objected to the first question addressed as not accurately reflecting a previous response by the witness. Heidi continued in her failure to respond to trial counsel's questions, saying that the reason she would not answer was because she was "mad at this guy right here" indicating the civilian defense counsel "because he won't be quiet." Trial counsel told Heidi that the defense counsel was simply doing his job, after which Heidi resumed answering questions. She testified that she had

gone to Andy's house; that her mother had gone with her; that she had watched television while there; that she had played with puzzles; and that her mother had left her alone with Andy at his house. When she was asked what she and Andy had done when they were alone at his house, she said, "I don't want to answer that question." After another recess, Heidi resumed answering questions, stating that when her mother was away from Andy's house, she and Andy had watched TV and put dishes away. The Military Judge sustained a defense objection to a question as to whether Andy had ever taken her back to the bedroom. When the question was rephrased, Heidi answered that she had gone into another room of the apartment with Andy, which she termed "the spare room." When asked what happend then, Heidi said she did not remember. Trial counsel asked if she remembered talking with him the evening before and testifying at the pre-trial investigation, to which she answered yes, but then testified that she did not remember what she had said. Heidi persisted in her statement that she did not remember, whereupon the trial counsel requested and was granted a recess until the following morning. On the following morning, Heidi resumed testifying, saying that she did remember what had happened, but did not wish to talk about it. A discussion was held among the Military Judge and counsel, in the absence of the witness and the court members. The civilian defense counsel stated during this discussion that he and the trial counsel had engaged in a comfortable discussion with Heidi a couple of evenings back. In response to a suggestion by the Military Judge as to the possibility that Heidi's current refusal to answer questions might be due to civilian defense counsel having intimidated her, that counsel stated that he had told Heidi that he did not believe a lot of the things she had said, and pointed out to her that her statements could be factually disproved. He stated that his perception of Heidi was as a very intelligent child with "an extreme ability to calculate when

she's being asked questions." Heidi had objected to testifying when people were in the courtroom. The possibility of a videotaped examination was explored, but Heidi's mother refused to permit that. [Heidi had made some scandalous statements concerning her mother's sexual activities with persons other than the petitioner during Heidi's examination at the pre-trial proceedings.] The Military Judge nonetheless had videotaping equipment set up in the courtroom. Heidi returned to the stand, and objected to the presence of women in the courtroom. The Military Judge explained that it was necessary for some people to be in the courtroom, and told Heidi that so long as she told the truth she would have nothing to fear. Heidi then said: "But I will not talk hard questions, and I will not talk about Andy doing anything in the bedroom—'cause I don't want to talk about those things. They just keep on making me remember and remember." After much discussion the Military Judge ruled that Heidi was unavailable as a witness and excluded her from the courtroom.

A transcript of Heidi's statements at the June 27th pre-trial investigation was prepared after Heidi had begun to indicate unwillingness to testify. On Saturday, October 29th, the pre-trial statements of Heidi were read to the court-martial. Heidi was not on the stand during the reading of those statements, and was at no time thereafter called to the stand to permit any cross-examination by the defense as to either such personal testimony as she had rendered up to the point of her refusal, or as to the recorded statements attributed to her during the pre-trial.

(2)

No. 88-839

JAN 31 1989

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANDREW L. ARRUZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the military court violated petitioner's rights under the Confrontation Clause by admitting at trial the recorded and sworn testimony of a witness at a preliminary hearing, when that witness was found to be unavailable to testify at trial.

2. Whether petitioner was denied a fair trial when, after defense cross-examination left the impression that an examining psychiatrist did not believe the victim, the trial judge allowed the psychiatrist to testify that in his opinion the victim honestly believed she had had a sexual encounter with petitioner and that in his opinion her testimony was worthy of belief.

3. Whether the pretrial preliminary hearing required by Article 32 of the UCMJ, 10 U.S.C. 832, satisfies due process requirements.

4. Whether the admission of an unavailable witness's testimony at an Article 32 hearing violated Article 50 of the UCMJ, 10 U.S.C. 850, which restricts the use of testimony given before "courts of inquiry" conducted pursuant to Article 135 of the UCMJ, 10 U.S.C. 935.

5. Whether the trial court erred by admitting rebuttal testimony by an expert about the general characteristics of child abusers once the defense had made petitioner's character an issue in the case.

6. Whether the Court of Military Appeals must independently examine the sufficiency of the evidence in every case.

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In the Supreme Court of the United States

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No. 88-839

ANDREW L. ARRUZA, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 8a-20a) is reported at 26 M.J. 234. The opinion of the Court of Military Review (Pet. App. 1a-7a) is reported at 21 M.J. 621.

JURISDICTION

The judgment of the Court of Military Appeals was entered on July 18, 1988. A petition for reconsideration was denied on September 22, 1988. Pet. App. 26a. The petition for a writ of certiorari was filed on November 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1986).

STATEMENT

Petitioner, a member of the United States Army, was convicted by a general court-martial at Mainz-

Gonsenheim in West Germany on two specifications of taking indecent liberties with a female under the age of 16, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to confinement for five years, dismissal from the service, and forfeiture of pay. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. The Court of Military Appeals affirmed.

1. Petitioner, an officer and a military chaplain, was charged with taking indecent liberties with a six-year-old girl on two occasions between December 29, 1982, and May 20, 1983. His victim, Heidi Carr, was the daughter of an Army sergeant whom petitioner had been seeing socially.

2. a. Article 32 of the UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted before trial in the civilian courts. The accused has the right to be informed of the charges against him, to be present during the hearing, to be represented by counsel, to be informed of the witnesses that the prosecution expects to call, as well as the identity of his accuser, to cross-examine all available witnesses, and to present any testimony or documentary evidence in his defense. He may also present any evidence that would mitigate the severity of the offenses. A defendant has the right to have defense counsel appointed to assist him during the hearing. Art. 38, UCMJ, 10 U.S.C. 838 (1982 & Supp. IV 1986); Rule for Courts-Martial 405(f) and (g), *Manual for Courts-Martial, United States – 1984*. Moreover, the convening authority may not refer a charge to a general court-martial for trial without

independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a) (1982 & Supp. IV 1986).

b. In this case, Heidi Carr testified under oath during an Article 32 hearing. Both petitioner and his appointed defense counsel were present during her testimony. AX 11. The verbatim transcript of Heidi's testimony during the hearing totalled 46 pages, GX 5; Tr. 318, 319, of which 30 pages consisted of defense counsel's cross-examination of Heidi, GX 5, at 15-44.

Heidi said that she was seven years old and knew that it was wrong to lie. GX 5, at 1. She testified that she went to petitioner's apartment with her mother on several occasions. During one of their visits, Heidi's mother left Heidi alone with petitioner. *Id.* at 6. While her mother was gone, petitioner took Heidi into the bedroom, placed her on the bed, and "took out his penis and put it in [her] privates." *Id.* at 8. She described petitioner's penis as being placed "[i]n the hole * * * [a] little bit," and she said that it hurt. *Id.* at 9. She said that petitioner's penis got wet and "[h]e wiped it off with a [yellow] tissue." *Id.* at 12. Petitioner also kissed her on the lips and on the same place as where he put his penis. *Id.* at 9. Heidi further stated that the petitioner kissed her and engaged in other sexual acts with her, probably on more than six occasions. *Id.* at 10-12.

c. At trial, Heidi testified that she met petitioner when she accompanied her mother to his apartment. Tr. 219-220. Heidi's mother left Heidi alone in the apartment with petitioner, and petitioner took her into an "extra room." Tr. 226. Heidi stated that she did not remember what happened in that room. Tr. 226. After a recess, she explained that she did remember what happened, but did not "want to talk about it." Tr. 232. Despite attempts by the prosecutor and the trial judge to persuade Heidi to

testify, she adamantly refused to say anything further. Tr. 231-234. Heidi stated that she could not explain "it in front of the ladies." Tr. 234. She said she would be willing to testify if no "ladies were present." Tr. 234. Heidi left the stand briefly, and when the court reconvened, the trial judge noticed that a female was seated at the defense table. Tr. 243. Defense counsel identified her as a member of the defense team. Tr. 244. The trial judge noted that the female defense attorney had previously been a spectator to the proceeding and had not been identified as a member of the defense team. Tr. 244.

Heidi returned to the stand, and she again refused to "talk in front of the ladies." Tr. 279, 280, 284. Heidi was then excused. Defense counsel refused to have the female laywer leave the defense table during Heidi's testimony. Tr. 285-291. The trial judge refused to substitute his "judgment of the defense's motives for the articulated and stated reasons that the defense" gave. He denied a government motion for the removal of the female defense counsel and the spectators so that Heidi could testify. Tr. 292.

On the government's motion, the trial judge found that Heidi was unavailable to testify within the meaning of Mil. R. Evid. 804(a)(2). Tr. 292-293.[1] The government then moved, pursuant to Mil. R. Evid. 804(b)(1), to admit

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[1] The judge did not believe that Heidi would answer any questions on cross-examination under any circumstances. He found, "based upon my questioning of [Heidi] and my observation of her demeanor, and her reaction to the civilian defense counsel, that even if all spectators and females were excluded (over strenuous defense objection), and even if she answered questions of the trial counsel, there was no substantial likelihood that she would, thereafter, answer questions on cross-examination." Memorandum of Special Findings. The judge also determined that contempt proceedings for Heidi were not a plausible alternative. *Ibid.*

Heidi's testimony at the Article 32 hearing as the testimony of an unavailable witness. Tr. 294. The judge admitted the testimony over defense objection.

d. During trial, the prosecution called Dr. Michael Vandewalle, an expert in child psychiatry who had examined Heidi on four prior occasions, in order to explain to the court-martial panel members how a child might react to sexual abuse. Tr. 350, 357, 359. Dr. Vandewalle said that the perceptions of young children are at times exaggerated and distorted. Tr. 370. He stated that children often delay reporting molestation when the molester is someone who is close to the family. Tr. 369. He also described the psychiatric traits and characteristics associated with sexually abused children. Tr. 360-363. Dr. Vandewalle testified that Heidi displayed many of those characteristics. Tr. 367.

During cross-examination, defense counsel asked Dr. Vandewalle if he believed Heidi's testimony. Dr. Vandewalle said that "something could have happened, but [he] didn't necessarily believe all the stuff that was in the [pretrial hearing]." Tr. 394. The trial judge then asked Dr. Vandewalle several questions proposed by the panel members; defense counsel objected to two of the questions. Tr. 409.[2] In response to the questions submitted

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[2] The questions to which defense counsel objected were:

"In your professional opinion do you believe Heidi Carr had a sexual encounter with [petitioner]?"

"Does Heidi Carr believe that she did have a sexual encounter with [petitioner]?"

Defense counsel objected to the questions on the ground that they went to the ultimate issue (*i.e.*, petitioner's guilt), and on the ground that they were irrelevant. The prosecutor argued that defense counsel had opened the door to the panel members' inquiry by asking Dr. Vandewalle if he believed the substance of Heidi's testimony. Tr. 408-410.

by the court members, Dr. Vandewalle stated that in his opinion Heidi believed she had had a sexual encounter with petitioner and that it was also his professional opinion that Heidi did have a sexual encounter with petitioner. Tr. 410-411.[3]

3. The Army Court of Military Review affirmed. Pet. App. 1a-7a. It upheld the trial court's finding that Heidi was unavailable, within the meaning of Mil. R. Evid. 804(a)(2) and (b)(1). Pet. App. 3a. The court also held that Heidi's testimony at the Article 32 hearing "was buttressed by sufficient indicia of reliability," and that the admission of her pretrial testimony therefore did not violate the Confrontation Clause of the Sixth Amendment. Pet. App. 3a-4a. In addition, the court held that the trial judge did not err by allowing Dr. Vandewalle to give his opinion as to Heidi's beliefs and the credibility of her testimony, because the defense had opened the door on cross-examination by asking the doctor for his personal opinion of Heidi's veracity. *Id.* at 5a. In any event, the court found that petitioner was not prejudiced by the admission of the doctor's testimony. *Id.* at 7a.

4. The Court of Military Appeals granted review limited to two questions and affirmed. Pet. App. 8a-20a. The first question involved the admissibility of Heidi's testimony from the Article 32 proceeding. The court found that Heidi was unavailable to testify at trial because "through a combination of trial maneuvers and apparent intimidation, civilian defense counsel succeeded in silencing [Heidi] at the court-martial." *Id.* at 9a (footnote omit-

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[3] Dr. Vandewalle further testified that he believed there was a sexual touching, but that he did not believe Heidi's statements that she was raped. Tr. 412. He said that Heidi believed that she was penetrated, but that she had an insufficient concept of "penetration" and her perception was therefore distorted. *Ibid.*

ted). The court held that Heidi's pretrial testimony was properly admitted under Mil. R. Evid. 804(b)(1) and that its admission did not violate the Sixth Amendment Confrontation Clause. Pet. App. 11a.

The second question involved the admissibility of Dr. Vandewalle's responses to the questions regarding Heidi's beliefs and her credibility. The court held that petitioner was not entitled to a new trial based on the admission of Dr. Vandewalle's answers in response to those inquiries from the panel members, because the defense had "opened the door" to the testimony by asking Dr. Vandewalle on cross-examination whether Heidi had lied or fantasized about the events at issue in the case. *Id.* at 16a. Even if the admission of the two answers was error, however, the court held that the error was harmless. *Ibid.*[4]

ARGUMENT

1. Petitioner claims (Pet. 12-14) that the admission at trial of Heidi Carr's testimony at the Article 32 hearing violated the Confrontation Clause of the Sixth Amendment. Petitioner argues that Heidi was available to testify at trial and that her testimony at the Article 32 hearing should not have been admitted, because he did not have a full and fair opportunity to cross-examine her at that hearing. His only motive for questioning Heidi at that time, petitioner argues, was to obtain discovery. That claim lacks merit.

a. To begin with, petitioner's counsel was at least partially responsible for Heidi's refusal to testify at trial, as

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[4] Judge Sullivan concurred in the result, on the ground that the defense had opened the door to Dr. Vandewalle's testimony. Pet. App. 19a. Chief Judge Everett dissented. He stated that in his view it was prejudicial error to permit the panel's questions to be answered. *Id.* at 20a.

the Court of Military Appeals found. Pet. App. 9a. Heidi told the trial judge she would not testify "in front of the ladies." Tr. 234. After Heidi made that statement, a female lawyer, who had not previously appeared for the defense, took a place at the defense table. Tr. 243-244. The defense refused to have the female attorney leave the courtroom during Heidi's testimony. R. 292. See also Memorandum of Special Findings. Accordingly, the Court of Military Appeals properly found that defense counsel's conduct contributed to Heidi's unavailability at trial.[5]

Under these circumstances, petitioner cannot claim that his confrontation rights were violated. Relying on a concept of implicit waiver or the principle that a person should not profit by his own wrongdoing, the courts have consistently refused to allow a defendant to complain about the lack of confrontation when the defendant himself wrongfully caused a witness's unavailability.[6] The waiver or estoppel doctrine applied in these cases rests "on a principle of reciprocity similar to the equitable doctrine of 'clean hands.' " *Steele* v. *Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983). That principle is applicable here. Given the actions of petitioner's counsel, which may be charged to petitioner

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[5] Petitioner's claim (Pet. 13) that Heidi's refusal to testify was prompted by her fear of being exposed as a liar is unsupported by anything in the record.

[6] See, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145, 158-160 (1878); *United States* v. *Mastrangelo*, 722 F.2d 13 (2d Cir. 1983), cert. denied, 467 U.S. 1204 (1984); *Steele* v. *Taylor*, 684 F.2d 1193, 1200-1204 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); *United States* v. *Thevis*, 665 F.2d 616, 630-633 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Balano*, 618 F.2d 624, 628-630 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); *United States* v. *Carlson*, 547 F.2d 1346, 1355-1360 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

himself (*Taylor* v. *Illinois*, No. 86-5963 (Jan. 25, 1988), slip op. 16-18), petitioner should not now be heard to claim that he was denied the right to confront Heidi at trial.

b. Even aside from the question of defense counsel's responsibility for Heidi's refusal to testify at trial, Heidi's pretrial testimony was independently admissible as the testimony of an unavailable witness at a prior judicial proceeding. Rule 804(b)(1) of the Military Rules of Evidence provides that the verbatim record of an Article 32 proceeding is admissible at trial if the declarant is unavailable. Accord Fed. R. Evid. 804(b)(1). Rule 804(a)(2), Mil. R. Evid., provides that a declarant is unavailable if he persists in refusing to testify concerning the subject matter of his prior statement despite an order by the trial judge to testify. In *California* v. *Green*, 399 U.S. 149 (1970), and *Ohio* v. *Roberts*, 448 U.S. 56 (1980), this Court held that the admission of the preliminary hearing testimony of an unavailable witness does not violate the Confrontation Clause as long as the defendant is given a fair opportunity to cross-examine the witness at the hearing.

In this case, the trial judge found that Heidi was unavailable to testify at trial, and that finding was upheld by both military appellate courts. Pet. App. 3a, 9a. It therefore does not warrant further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8; *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984).[7] Since Heidi was unavailable to testify

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[7] The trial judge's finding is also amply supported by the record. In fact, the trial judge did everything possible to convince Heidi to testify. After her initial refusal to testify, Tr. 229, Heidi was twice recalled to the stand, Tr. 231, 279, but she refused to testify on both occasions despite the judge's efforts. The trial judge told Heidi that she had to testify, Tr. 234, the judge offered to videotape her

at trial, the admission of her testimony at the Article 32 hearing did not violate the Confrontation Clause, because her testimony was "given under circumstances closely approximating those that surround the typical trial." *California* v. *Green*, 399 U.S. at 165. The charges against petitioner were the same at the Article 32 proceeding as at trial. Heidi was under oath during her testimony at the Article 32 proceeding. Petitioner was present at the hearing, and he was represented by the same appointed counsel who represented petitioner at trial. The pretrial hearing provided a verbatim record of Heidi's testimony. And not only did petitioner have an opportunity to cross-examine Heidi at the Article 32 proceeding, he took full advantage of that opportunity: 30 of the 46 pages of Heidi's testimony consist of defense cross-examination. The decision below is therefore fully consistent with this Court's decisions in *California* v. *Green*, *supra*, and *Ohio* v. *Roberts*, *supra*, which upheld the admission of the preliminary hearing testimony of an unavailable witness in similar circumstances.

Petitioner contends (Pet. 13) that the admission of Heidi's pretrial testimony was erroneous since his cross-examination at the earlier proceeding was conducted solely for discovery purposes. That claim lacks merit. Although

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testimony with only himself, petitioner, and counsel present, Tr. 275-276, and the judge asked defense counsel if he would object to the removal of all women in the courtroom in order to persuade Heidi to testify. Tr. 285. Defense counsel, however, objected to any of the court's proposed solutions to the problem of Heidi's unwillingness to proceed. Tr. 283. The trial judge determined "that the threat of contempt proceedings [wa]s not a viable consideration for dealing with a seven-year-old witness." Memorandum of Special Findings.

petitioner's counsel did say at the Article 32 hearing that he would limit his cross-examination of Heidi to discovery purposes (Pet. 9), each of the courts below found that counsel did not so limit his questioning. See Pet. App. 2a-3a, 10a-11a.[8] As the verbatim transcript of the Article 32 proceeding shows, see GX 5,[9] defense counsel's questions "comported with the principal purpose of cross-examination: to challenge 'whether the declarant was sincerely telling what [she] believed to be the truth, whether the declarant accurately perceived and remembered the matter [she] related, and whether the declarant's intended meaning is adequately conveyed by the language [she] employed.' " *Ohio* v. *Roberts,* 448 U.S. at 71 (citation and emphasis omitted). The record thus demonstrates that petitioner had the opportunity to develop Heidi's testimony in any manner he deemed in his interest and that defense counsel made full use of that opportunity.[10] In these circumstances, the courts below correctly rejected petitioner's claim.

2. Petitioner contends (Pet. 14-15) that the trial court erred by allowing Dr. Vandewalle to answer two questions from the court-martial panel by stating that he believed

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[8] The trial judge entered special findings that defense counsel's cross-examination at the hearing was for the dual purpose of impeachment and discovery. Memorandum of Special Findings.

[9] Defense counsel not only questioned Heidi's memory of the events, but also attacked her veracity by attempting to demonstrate that she had substantial knowledge about sex and had in the past made complaints about being sexually abused. See GX 5, at 21-33.

[10] Petitioner claims (Pet. 13) that cross-examination at a preliminary hearing is not as valuable as cross-examination at trial. That may often be true, but it is also immaterial. This Court has held that it is unnecessary to inquire into the effectiveness of defense cross-examination at a particular pretrial hearing. *Ohio* v. *Roberts,* 448 U.S. at 73 n.12.

Heidi had been sexually assaulted.[11] That claim lacks merit since defense counsel opened the door to the panel's questions, as each court below found. See Pet. App. 5a, 16a, 19a (Sullivan, J., concurring).

Defense counsel's cross-examination created the erroneous impression that Dr. Vandewalle did not believe Heidi had been abused and that he believed she may have been fabricating her story. Tr. 386, 398; Pet. App. 12a-13a n.4. The defense thus opened the door to the panel's questions concerning Dr. Vandewalle's beliefs. Petitioner tacitly concedes as much by arguing (Pet. 15) that he had no other means of challenging Heidi's credibility once the trial judge admitted Heidi's Article 32 testimony. But since petitioner was at least partially responsible for Heidi's unavailability, petitioner cannot now claim that he was in effect forced to try to get Dr. Vandewalle to suggest that he did not believe Heidi's story. In any event, given the other proof of petitioner's guilt, the military appellate courts correctly found that any error could not have prejudiced petitioner. Pet. App. 7a, 16a.

3. Petitioner next contends (Pet. 11-12) that the military justice system should be required to follow pretrial procedures comparable to civilian grand jury proceedings before a servicemember can be charged with sexual assault.[12] That claim is meritless. The Fifth Amend-

[11] Petitioner also claims that the only role for psychiatric testimony in a child abuse case is to establish or refute a claim that a child suffers from a mental illness affecting her credibility. Petitioner cites no authority for that proposition, and it lacks merit. Testimony about the effects of abuse or molestation on a child victim can be an appropriate subject for expert testimony. See, *e.g.*, *United States* v. *Snipes*, 18 M.J. 172 (C.M.A. 1984); *United States* v. *Moore*, 15 M.J. 354 (C.M.A. 1983); *State* v. *Myers*, 359 N.W.2d 604, 610 (Minn. 1984).

[12] The Court of Military Appeals did not grant review on this question, or on any of the other questions hereafter discussed in this brief. Accordingly, it is not clear that those questions are even subject to

ment Indictment Clause specifically exempts "cases arising in the land or naval forces" from the requirement of an indictment by grand jury for serious crimes. *Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 123 (1866). In the military system, the pretrial adversarial Article 32 hearing serves the grand jury's function of determining whether there is probable cause that a crime has been committed and protecting servicemembers against unfounded accusations. Compare *Branzburg* v. *Hayes,* 408 U.S. 665, 686-687 (1972). In fact, the Article 32 hearing guarantees a servicemember protections not afforded to his civilian counterpart. *Gosa* v. *Mayden,* 413 U.S. 665, 681 n.6 (1973) (plurality opinion). See also *United States* v. *Ledbetter,* 2 M.J. 37, 43 (C.M.A. 1976); *Mercer* v. *Dillon,* 19 C.M.A. 264, 266, 41 C.M.R. 264, 266 (1970); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant,* 22 Me. L. Rev. 105, 109-114

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review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) (Supp. IV 1986) and 10 U.S.C. 867(h)(1) (Supp. IV 1986), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Section 867(h)(1) further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right, which it exercised in this case, to limit its decisions in any case to less than all the issues urged by the accused. See 10 U.S.C. 867(d). Because the Court of Military Appeals accepted for review only the first two questions raised here by petitioner, there is a question whether that court rendered a "[d]ecision" on the remaining issues that petitioner presents in his petition, and whether the refusal to accept the remaining issues for review constituted an "action" of that court "in refusing to grant a petition for review" within the meaning of Section 867(h)(1). Those questions do not require an answer in this case, however, because none of the issues presented by petitioner warrant review by this Court in any event.

(1970). Compare *Gerstein* v. *Pugh*, 420 U.S. 103, 119-125 (1975) (describing limited procedures required at a civilian pretrial probable cause hearing). The pretrial procedures employed in the military justice system therefore satisfy any possible due process requirements.

4. Petitioner claims (Pet. 18-20) that the trial judge erred by admitting evidence during the government's rebuttal case concerning the general characteristics of a sexual abuser. That claim arose in the following setting: At trial, petitioner introduced sworn affidavits from various acquaintances stating, in effect, that petitioner was moral and law-abiding. DXs P-T and Y-Z. In rebuttal, the government offered the testimony of an expert, Dorothy Ogilvy-Lee, in order to respond to petitioner's suggestion that a law-abiding citizen is incapable of committing sexual abuse. The trial judge found that Ogilvy-Lee was an expert, Tr. 710, and permitted her to testify about the general characteristics of child abusers.[13] On cross-examination, defense counsel elicited several inconsistencies between those characteristics and petitioner's, Tr. 761-768, and counsel later argued that petitioner did not fit the profile that Ogilvy-Lee described. Tr. 821-822.

Contrary to petitioner's contention, Ogilvy-Lee's testimony was relevant because it responded to petitioner's suggestion that, as a law-abiding citizen, he was incapable of committing sexual abuse. Moreover, the risk that petitioner was prejudiced by Ogilvy-Lee's testimony is extremely low. She did not suggest that petitioner was a child abuser; rather, she testified only that his status did not

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[13] Ogilvy-Lee testified that the profile indicated (1) aggressive sexual offenses against children are the exception rather than the rule; (2) most abusers are heterosexual; (3) they are "non-assertive and non-violent"; (4) they are often well known to the victim; and (5) they tend to be individuals who have no record of prior criminal behavior. Tr. 757-761.

preclude it. She also testified that "[p]robably a fairly large part" of the male population shares the characteristics of a sexual offender. Tr. 768 She said that a sexual offender can be a "professional, semi-professional, or skilled blue collar" worker. Tr. 771. Finally, the trial judge instructed the panel members to consider Ogilvy-Lee's testimony solely "as evidence that persons who are credible, moral, and law abiding are capable of committing the alleged offenses." Tr. 866. The members were expressly instructed "not to consider her testimony as evidence that it is more probable that [petitioner] committed the alleged offenses." *Ibid.* Under these circumstances, the admission of Ogilvy-Lee's testimony was not error.

5. Petitioner also contends (Pet. 15-18) that Heidi's Article 32 testimony was admitted in violation of Article 50 of the UCMJ, 10 U.S.C. 850. Article 50 prohibits the admission, at a capital trial or in a case in which a commissioned officer may receive a dishonorable or bad conduct discharge, of testimony given by a witness at a "court of inquiry." Petitioner, however, has confused an Article 32 hearing with a military court of inquiry.

A court of inquiry is a formal fact-finding tribunal consisting of three or more members convened under Article 135 of the UCMJ, 10 U.S.C. 935. A court of inquiry is used to conduct an investigation only when no other tribunal is available and when the matter is of grave importance to the military or to the individual, such as when a ship is sunk. Although a court of inquiry is a formal investigation, the rules of evidence do not apply to such an investigation.[14] By contrast, an Article 32 hearing, such as

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[14] See Army Reg. 27-10, *Legal Services: Military Justice* para. 10-2 (July 10, 1987). Before a court of inquiry, the parties are denominated as those "whose conduct is subject to inquiry" and those having "a direct interest in the inquiry." Parties may be designated at the begin-

the one held in this case, is not a court of inquiry. It is a pretrial hearing comparable to a preliminary hearing in the civilian criminal justice system, and it is a prerequisite to convening a general court-martial. Unlike a court of inquiry, an Article 32 hearing offers the accused the same opportunity, and supplies him with the same motivation, to defend himself against his accusers that he has at trial. In addition, the Military Rules of Evidence apply at an Article 32 hearing.

In this case, no court of inquiry was assembled. Article 50 of the UCMJ is therefore inapposite. Moreover, Mil. R. Evid. 804(b)(1) provides that the testimony of a witness given at an Article 32 hearing may be admitted at trial and therefore rebuts any suggestion that the prohibition in Article 50 should apply to Article 32 proceedings. Because the pretrial proceeding held in this case was an Article 32 hearing and not an Article 135 court of inquiry, petitioner's reliance on Article 50 is misplaced.

6. Petitioner claims (Pet. 20-22) that the Court of Military Appeals must review the record in every case to ensure that the evidence is sufficient to support a conviction. That claim lacks merit. The Court of Military Appeals has the statutory authority, which it exercised in this case, to limit its decision in any case to less than all the issues presented by a defendant. 10 U.S.C. 867(d). That provision was designed to allow the Court of Military Appeals to resolve only those issues of general importance to the entire military justice system. Moreover, the court of military review must independently review the sufficiency of the evidence in every case pursuant to Article 66(c) of the UCMJ, 10 U.S.C. 866(c). That requirement, which

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ning of the inquiry or later in the proceedings. *Id.* para. 10-5. The presence of the parties is not essential. See *id.* paras. 10-3 to 10-8.

was satisfied here, see Pet. App. 3a, ensures that the evidence is sufficient to support a servicemember's conviction.[15]

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[15] Petitioner at two points (Pet. 10-11, 22-23) suggests that there is a constitutional flaw in the statute permitting the Court of Military Appeals to foreclose this Court's certiorari jurisdiction by declining to grant review of particular decisions of the courts of military review. Petitioner cites no authority for that proposition, and we believe there is no merit to it.

Prior to 1983, this Court had no certiorari jurisdiction over Court of Military Appeals cases at all. The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, created certiorari jurisdiction in military cases for the first time, but limited that jurisdiction to cases in which the Court of Military Appeals had granted review. Before that Act was passed, it was accepted that the judgments of military courts were not subject to direct review by this Court in any case. See *In re Yamashita*, 327 U.S. 1, 8 (1946); *Fowler* v. *Wilkinson*, 353 U.S. 583, 584 (1957). Since the federal courts have only the jurisdiction that Congress has granted, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, No. 87-1372 (Jan. 23, 1988), slip op. 4, there is no constitutional infirmity in a statute which ameliorates the former rule, but does so only with respect to a limited number of cases in the military system. In any event, this case does not properly present that question, because the Court of Military Appeals granted review in this case, and because it is unclear whether the limitation on this Court's certiorari jurisdiction applies to non-granted issues in cases in which the Court of Military Appeals has granted review of the lower court's judgment. See pages 12-13 note 12, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANDREW L. ARRUZA, CAPTAIN
CHAPLAIN'S CORPS, UNITED STATES ARMY,
056-32-5107,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The petition of Andrew L. Arruza for a writ of certiorari was filed November 21, 1988, with copies being served upon the Solicitor General on the same date. Printed copies of the brief in opposition were filed on February 2, 1989, copies thereof being received by mail by counsel for the petitioner on February 3rd.

STATEMENT

1. The brief in opposition challenges the statement of the case as set forth in the petition in one respect only. Although in error in denying any support in the record for a defense theory, the brief in opposition raises new factual and inferential considerations which merit discussion in the interests of maximally informing the Court.

2. The brief in opposition proceeds upon the assumption that refusal of the child witness to testify at the court-martial trial as to molestation of her by the petitioner was prompted by her being intimidated by the civilian defense counsel through introduction of a woman lawyer at the defense table after Heidi had indicated reluctance to testify when women were in the courtroom. (BO 4) That brief further states (p. 8, n.5) that there is no basis in the record for petitioner's assertion (pet. 13) that Heidi's refusal was motivated by her fear of being exposed as a liar.

3. The issue of Heidi's motivation in refusing to testify is a red herring. Fathoming the mind workings of a just-turned-seven-year-old television-educated child would have required many hours of psychoanalysis by a specially experienced psychiatrist. Unfortunately, from the standpoint of advancing Heidi's welfare, all medical and social services attention given her was directed to the end of making out a case for criminal prosecution of the petitioner, not to evaluation of Heidi's long-standing psychosocial maladjustment. No issue with respect to Heidi's

suspected motivation was raised in briefs or arguments before either the Court of Military Review or the Court of Military Appeals. The Court of Military Review, which has exclusive cognizance of issues of fact, found only that Heidi "became emotionally distraught during her testimony and, notwithstanding extensive efforts . . . to encourage her to testify fully regarding the charged offenses, was psychologically unable to do so." (Pet. appx. 3a)

4. The Court of Military Appeals, which is statutorily restricted to taking "action only with respect to matters of law" (10 USC § 867(d), pet. appx. 34a), surmised out of the blue sky that Heidi had been silenced at the court-martial by the *defense*, "through a combination of trial maneuvers and apparent intimidation," and that court members were influenced by such defense "antics" to conclude that the petitioner was guilty. To the credit of the writer of the opinion, he recognized that another possible inference was that Heidi was unable to perpetrate the lie when confronted with the truth (pet. appx 3a and n. 1).

5. As to both the pejoratively termed "antics" of trial defense counsel, and the opposition brief writer's declaration that nothing in the record supports petitioner's contention that Heidi's refusal to testify was motivated by her fear of being exposed as a liar, page 221 of the trial record reveals that at the very outset of the prosecution substantive examination in chief of Heidi, she indicated nonresponsiveness concerning such routine questions as whether she had eaten meals in petitioner's apartment and what was served. The sole action of the civilian defense counsel was to suggest that the trial counsel slow down and give Heidi a chance to answer the trial counsel's questions. To this the Military Judge responded, "Good idea." After head nodding responses to two more questions, the trial counsel asked if Heidi were "scared." Without having been given any provocation, Heidi stated

that the reason for her refusal to answer was because "He" (pointing to the civilian defense counsel) "will say I'm lying," and broke into tears. A recess was ordered for seven minutes, after which Heidi returned to the stand and resumed testifying. Thereafter she began equivocating and stipulating conditions under which she might testify as to the conduct of the petitioner, one of such conditions being if women were excluded from the court room. Trial defense counsel did thereafter have a woman lawyer appear at the counsel table as a member of the defense team. The trial counsel objected; both counsel argued the matter; and the Military Judge overruled the objection. The assessment of the Military Judge, present at the time and place, is certainly superior to any made *aliunde* 4-5 years later. Concerning petitioner's inference that Heidi's reluctance to testify was due to fear of being exposed as a liar, the testimony of Heidi's day care custodian should be noted. That woman, who was the mother of five children of her own, testified (R. 521) that she considered Heidi to be very untruthful, and (R. 528) that when Heidi was confronted with a lie, she would not recant, but would become emotional and refuse to talk.

6. *Coy* v. *Iowa*, —— U.S. ——, 101 LEd2d 857, was handed down by this Court June 29, 1988, less than three weeks before the Court of Military Appeals decision of the case of petitioner. Even the dissenting Justices in *Coy* recognized that the confrontation rule precludes use of out-of-court statements in lieu of live testimony in child abuse cases. The Court of Military Appeals denied without comment a timely petition for reconsideration of the case of petitioner, inviting their attention to *Coy*. (Pet. appx. 21a-26a) The brief in opposition does not mention *Coy* v. *Iowa*.

7. Certiorari is sought to the end of obtaining a ruling that an eleventh hour surmise of defense counsel misconduct by an appellate court whose jurisdiction is statu-

torily limited to matters of law, may not be asserted as a basis for upholding denial of a constitutionally guaranteed right of confrontation.

SUMMARIZED QUESTIONS PRESENTED *IN THE PETITION*

I. Is Supreme Court review on certiorari limited to issues as to which the Court of Military Appeals has granted a petition for review?

Pet. pp. 10-11; BO n. 12 pp. 12-13, n. 15, p. 17

The brief in opposition indicates doubt as to whether the *question* is subject to review on certiorari. The Court of Military Appeals unquestionably granted a petition for review in petitioner's case, which confers certiorari jurisdiction under 10 USC § 867(h)(1) and 28 USC § 1259. The Supreme Court therefore has power to construe the second sentence of § 867(h)(1).

Petitioner is particularly concerned as to the authority of the Supreme Court to review the issue of sentencing him to dismissal contrary to 10 USC § 850 (Question V., below). It is only by virtue of his having retained private counsel, and paid out-of-pocket the printing costs, that petitioner has been able to ask for certiorari. If granted, he should not be put to the cost of pursuing a separate proceeding to enjoin statutorily prohibited action if he does not prevail upon review of either of the issues as to which the Court of Military Appeals did grant review. Military and civilian bars urgently require guidance on this issue.

II. Does the Fifth Amendment require confidential "probable cause" investigation precedent to preferring capital or otherwise infamous charges against a commissioned officer?

Pet. pp. 11-12; BO pp. 12-14.

The brief in opposition does not address the issue of whether the Fifth Amendment may in some situations

require preliminary investigative procedures additional to those set forth in the Uniform Code of Military Justice.

III. Was petitioner unconstitutionally denied confrontation with the child witness whose extrajudicial narration provided the sole basis for his prosecution?

Pet. 12-14; BO pp. 3-5, 6-11.

Matter newly raised in the brief in opposition is discussed in the Statement, pages 1-4, above.

IV. Child psychiatrist permitted to testify over objection as to his personal belief in the guilt of the petitioner.

Pet. pp. 14-15; BO, 5-7, 11-12

All judges of the Court of Military Appeals agreed as to the impropriety of this questioning, and the Chief Judge dissented on this ground. The conviction was affirmed only on the premises, (a) that the testimony was necessitated by questions of the civilian defense counsel on cross-examination, the answers to which tended to make the members of the court-martial believe that the psychiatrist did not think the child witness truthful, and (b) that the error was "harmless." It is preposterous to term this error harmless, as the dissent of the Chief Judge indicates. Nothing is perceived in the questioning (quoted pet. appx., 13a) which could not have been fully cured by instruction of the court-martial, if in fact there was any error.

Division of the Court of Military Appeals and weakness of the reasoning of the majority justify certiorari as to this issue.

V. Disregard of statutory prohibition of sentence to dismissal.

Pet. pp. 17-18; BO, pp. 15-16.

The brief in opposition misconceives 10 USC § 850. The statute does not apply solely to testimony rendered before a court of inquiry, as Military Rule of Evidence 804(b)(1) makes clear (Pet. appx. 30a). Section 850(b) as set forth on page 28a of the appendix to the petition contains a typographical error. It should read: (b) Such testimony may be read in evidence only by the defense in capital cases *or cases* extending to dismissal of a commissioned officer. The last sentence of MRE 804 (b)(1) makes subject to the limitations of Section 850 (b) any form of prior testimcny that may be introduced, specifically including a pre-trial investigation. This must be so, as otherwise the limitations of 850(b) could be evaded by the device of conducting another investigative proceeding concurrent with a court of inquiry, calling the same witnesses and asking the same questions. The legislative intent for over two hundred years has been to prohibit dismissal of officers upon anything other than live testimony rendered in open court, no matter how unpopular the officer or how heinous the offenses alleged in the prior recorded testimony.

The wording of § 850 is deceptive. It is doing two things, i.e., absolutely prohibiting *introduction* of recorded testimony to support capital charges against any servicemember, regardless of status; but permitting introduction in noncapital cases, subject to the condition that if such evidence is introduced, no sentence of dismissal may be imposed upon an officer if the officer's conviction is based upon such evidence. This was clearly stipulated in the regulations implementing § 850 in 1951, and the Congress has at no time amended the statute during the ensuing 38 years. (Pet. appx. 30a)

It should be of particular interest to the Armed Forces to obtain a definitive ruling from the Supreme Court as to the foregoing necessary interpretation of Article 50 (§ 850). It would be material in any new trial of petitioner if his conviction is reversed, and is of vital concern to the petitioner if his conviction is upheld.

VI. Testimony of social service worker as to "typical profiile" of child sexual abuser.

Pet. pp. 18-20; BO, pp. 14-15.

The instruction of the Military Judge (BO p. 13) tended to heighten in the minds of court members the impression that the command was sending them some hidden message in introducing evidence to establish so patent a proposition as that men of good appearance and reputation sometimes commit crimes.

VII. Review by Court of Military Appeals of whether a conviction is supported by substantial evidence and is not contrary to the manifest weight of the evidence.

Pet. pp. 20-22; BO p. 16-17.

Although prohibited from reweighing evidence or reassessing credibility of witnesses, the Court of Military Appeals is not precluded from ruling, contrary to the Court of Military Review, either that a case is or is not supported by substantial evidence, or is or is not contrary to the manifest weight of the evidence—these being universally held to be matters of law. In the case of petitioner there was no in-court testimony establishing a *corpus delicti*, and affirmative evidence of innocence of the accused included his own testimony, the testimony of the mother of the self-asserted child victim, the day care custodian of the child, the child's schoolteachers, the former wife of the petitioner (who is also the mother of his two grown daughters and his adolescent son), and even the former commanding officer of the accused who, upon no basis other than two hearsay investigative reports, and despite the vehement denial of the petitioner on face-to-face confrontation, had improvidently signed and sworn to charges of rape and sodomy, effectively compelling hue and cry investigation and trial of petitioner.

VIII. Supervisory responsibility of the Court of Military Appeals with respect to the military justice system.

Pet. pp. 22-23; no comment in BO.

Navy-Marine Court of Military Review v. *Carlucci*, 26 M.J. 328 (CMA, July 22, 1988) and *United States* v. *Billig*, 26 M.J. 744 (USNMCR, April 13, 1988) are pertinent. In *Carlucci*, the Court of Military Appeals held that it had inherent supervisory authority over the military justice system which enabled it to enjoin the Secretary of Defense from pursuing an investigation into whether the action of the Court of Military Review in reversing the conviction of *Billig* had been procured by bribery. One of the Judges of the Court of Military Appeals was appointed Special Master to consider and report any evidence of bribery, and he later reported receiving no substantial evidence.

In the case of petitioner, the general supervisory power should have been utilized to require the Army Court of Military Review to reconsider the case and render findings based on the evidence as to any specific questions of fact which the Court of Military Appeals considered to be unresolved. The Court of Military Review could at the same time have been directed to make a reasoned ruling on the record on the issue of prohibition of a sentence extending to petitioner's dismissal, rather than cavalierly brushing this issue aside as "nonmeritorious."

All former avenues of executive and legislative review having been closed (pet. pp. 22-23), it becomes incumbent upon the Court of Military Appeals to assume that Courts of Military Review have complied with their statutory charter to "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record should be approved." (10 USC § 866(c), pet. appx. 33a) It is sub-

mitted that the Congressional intent, in conferring certiorari review power upon the Supreme Court, was to provide a check to insure that the Article I Court of Military Appeals and Courts of Military Review have complied with their authorizing statutes in letter and spirit.

CONCLUSION

The underlying issue presented by the petitioner in this case is one of long standing: Is the trial of members of the Armed Forces upon charged offenses which are not exclusively military in character to be conducted in accordance with generally prevailing federal law, or as a ceremonial means of assuredly eliminating from the service members whom the command no longer considers useful? If court-martial proceedings are to be show trials only, then there is no place in them for professional lawyers, and permitting military members accused to retain private counsel represents a deceptive cruel hoax. Able and conscientious lawyers will not long continue to participate in a system in which they are but Thespians, expected to render an impressive histrionic performance, but also expected gracefully to accept the end result programmed by the command playwright. The Military Justice Act of 1983, in permitting review upon writ of certiorari by the Supreme Court of certain court-martial cases, provided a means of imposing upon the Armed Forces a government of law in military criminal prosecutions, and a means of enabling lawyers in the active military service to function as professionals. Precedents and assurance of their recognition and enforcement are the sole tools of the lawyer's trade. The case of petitioner uniquely presents several issues as to which valuable controlling precedents can be rendered, and it fortunately involves a situation in which the evidence, impartially viewed, preponderates in favor of petitioner's innocence. It is therefore submitted

as being an ideal case in which to grant certiorari for review of all questions presented.

Respectfully submitted,

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